Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States
October Term, 1998

VERONICA L. DAVIS

Petitioner

vs.

SYNTEX LABORATORIES, INC.
ROCHE BIOMEDICAL LABORATORIES, INC.

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI AND SUMMARY REVERSAL

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56 pp

QUESTIONS PRESENTED FOR REVIEW

As a result of the United States District Court proceeding, the trial court dismissed Petitioner's cause for failure to obtain an expert report, within the time frame designated by the trial court, pursuant to the trial court's pretrial order,. The court allowed the Defendants to designate the type of expert to be obtained. At the time of entry of the pretrial order, Petitioner had not obtained or designated any experts, other than her treating physicians. Petitioner advised the trial court of an inability and the impediments in obtaining this information within the time frame set by the trial court. The Court further prohibited Petitioner from obtaining discovery and disclosure of Defendant's records, drug interaction reports, and other relevant material until the production of an expert report.

The questions presented are:

1. Whether the trial court denied the appellant due process by issuing an order mandating that appellant obtain an expert in contravention of the Federal Rules of Civil Procedure 16, 26(a), and 26(b, which imposes no requirement to engage in discovery or to obtain an expert.
2. Whether the court's order denying appellant to seek discovery or disclosure from Defendants as allowed by the Federal Rules of Civil Procedure 26,29, 33,34, 36 resulted in a denial of due process to appellant and the equal protection of laws, as well as the denial of the ability to redress grievances to the

court in violation of the First and Fourteenth Amendments to the united States Constitution.

3. Whether the trial court may dismiss a cause for failure to obey a pretrial order when a party has shown an inability to comply.

4. Whether the trial court has the grant of authority to dismiss a cause of action as a sanction, when dismissal results in a denial of due process.

5. Whether being subjected to a judge who exhibits bias and lack of impartiality constitutes a denial of due process?

6. Whether the taxation of costs against the Petitioner was an abuse of discretion by the trial court or violative of 28 U.S.C. § 1920.

PARTIES TO THE PROCEEDING

The Petitioner in this case is Veronica L. Davis, proceeding pro se. The Petitioner is also an attorney, licensed to practice in the state of Texas. Petitioner's address is 222 N. Mattson, West Columbia, Texas 77486.

The Respondents are Syntex Laboratories, Inc. and Roche Biomedical Sciences, Inc. The caption, however, reads, Roche Biomedical Laboratories, Inc., due to the ruling with the United States District Clerk and the Fifth Circuit Court of Appeals, that the caption must match the docket sheet.

Attorneys for Respondents and the trial court level and appellate court level were Richard L. Josephson and Mark Walters, of Baker and Botts. LLP, 910 Louisiana, Houston, Texas 77002.

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)N FOR A WRIT OF CERTIORARI
ND SUMMARY REVERSAL

L. Davis, respectfully petitions for a writ of he judgment of the United States Court of Appeals it in this case, and for summary reversal of that

OPINIONS BELOW

on of the Court of Appeals denying rehearing inafter referred to as App., is not reported. The ɔurt of Appeals on the merits (App. 2) is not :ision of the United States District Court for the Texas, Houston Division (App. 3) is not reported.

JURISDICTION

ction of this Court is invoked under 28 U.S.C. ıion of the United States Court of Appeals was 1998. On August 10, 1998, the Court of Appeals : denied the Petition for Rehearing by the panel.

:ITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment to the **United States Constitution**

ngress shall make no law pecting an establishment of igion, or prohibiting the free ercise thereof; or abridging the edom of speech, or of the press; the right of the people to

> peaceably assemble, and to petition the Government for a redress of grievances.

The **Seventh Amendment** to the **United States Constitution** provides that:

> In a suit at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved,....

The **Fourteenth Amendment** to the **United States Constitution** provides as follows:

> SECTION 1.All persons born or naturalized in the United States and subject to the jurisdiction thereof, are Citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1920 provides as follows:

A judge or clerk of any court of the Unites States may tax as costs the following:

(1) Fees for the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Docket fees under section 1923 of this title

(5) Compensation of court appointed experts.....

28 U.S.C. § 2072, known as the *Rules Enabling Act* provides in pertinent part:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district court..... and courts of appeals.

(b) Such rules shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect.

STATEMENT OF THE CASE

Petitioner is an individual who filed a products liability cause of action in the United States District Court of the Southern District of Texas, Houston Division, on the basis of diversity of citizenship. Petitioner filed the product liability suit complaining of injuries sustained as a result of taking a drug manufactured, designed, distributed, and marketed by the Respondents for the use of

endometriosis in women. In addition to proportionally minor complaints attributed to the drug, such as excessive weight gain, fatigue, severe headaches, depression and sleeplessness, Petitioner sought relief for the major complaints of pituitary gland enlargement, pituitary adenopathy, cardiovascular disorders, and cerebral hemorrhage associated with the drug.

Petitioner sought disclosure and discovery from Respondents relevant to the information produced by them to the Food and Drug Administration regarding side effects of the drug, drug interactions studies, complaints regarding the drugs, as well as all empirical data and studies performed in connection with the drug. Based upon information obtained from medical journals and the Food and Drug Administration, Petitioner had sufficient information to substantiate her claims that the drug, Synarel (Nafarelin acetate) caused or contributed to the medical problems of which she complained.

The Court ordered Petitioner to produce an expert report, explaining the causal connection between the drug and her condition. (App. 4), within a limited time frame and early in the litigation. The trial court later modified its order mandating that Petitioner produce an expert report from an endocrinologist connecting Petitioner's problem to an "unreasonable and unanticipated harm to her pituitary." (App.5)

Upon Petitioner's inability to comply with said order, the trial court dismissed Petitioner's cause, with prejudice. (App. 3). The trial court rejected all documentation, data, and journal articles evidencing the causal connection between the drug and Petitioner's injuries.

The trial court further rejected Petitioner's earlier Motions for Reconsideration/Motion to Vacate the Court's Order (Doc#. 14,23, 27), Motion to Compel Motion for Sanctions (Doc# 13 and its Motion for Recusal (Doc# 29).

On appeal, Petitioner set forth 6 bases for appeal, which are encapsulated into the following:

1. Whether the trial court abused its discretion in dismissing Appellant's case with prejudice by requiring Appellant to submit an expert report, prior to designation of an expert by Appellant early in the discovery phase of the case and by failing and refusing to allow Appellant a continuance to obtain said report, upon a showing of good cause.
2. Whether the trial court abused its discretion in failing and refusing to allow disclosures and discovery from Appellees by the Appellant.

The court denied Appellant's appeal on the bases that courts are vested with inherent powers to manage and control its docket efficiently and that it is within the authority of the court to grant dismissal upon the disobedience of those orders.

Upon rehearing, Appellant raised the following issues for rehearing:

1. The Appellate court erred in finding that the District court could dismiss the case with prejudice as sanctions for failure of a party to obey court orders.

2. The court erred with respect to finding that Appellant failed to comply with court orders, thereby warranting dismissal.

3. The Court of Appeals failed to make a ruling regarding the Appellant's assertion that the trial court abused its discretion in taxing costs of discovery against Appellant. (See Petitioner/Appellant's Motion for Rehearing).

Appellant's Motion for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ, which are more fully expounded below, is that the trial court and the Fifth Circuit Court of Appeals have decided federal questions of substance in a manner inconsistent with applicable decisions of this Court. Moreover, there appears to be a conflict between the circuits regarding the bounds or limitations of the court in exercising management and control of its docket, and in what constitutes discovery abuse which would warrant sanctions. The dramatic departures from this court's pronouncements and that of other circuit district courts(6th, 7th, 9th) provides a compelling basis for this court to review the decision of the Court of Appeals for the Fifth Circuit. Additionally, the trial court has so far departed from the accepted and usual course of judicial proceedings and the appellate court has sanctioned this departure, such that the exercise of this Court's supervisory power is necessary. Finally, separate and apart from the federal questions raised by this litigation, this court's decision has widespread impetus, in that it affects any and

all persons who have taken the drug, Nafarelin acetate who have no knowledge of its latent or patent effects.

I. THE FIFTH CIRCUIT COURT OF APPEALS RULING FUNDAMENTALLY MISINTERPRETS THE TRIAL COURT'S GRANT OF AUTHORITY TO MANAGE AND CONTROL ITS DOCKET IN THAT ITS DECISION CONFLICTS WITH THE FEDERAL RULES OF CIVIL PROCEDURE, 28 U.S.C. § 2072, THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE SEVENTH CIRCUIT.

The trial court exceeded it's grant of authority to manage and control its docket by mandating that Petitioner obtain an expert report and her medical records in order thereby resulting in dismissal without proper development of Petitioner's case.

As heretofore stated, early in the development of the case (three weeks after the Rule 16-**Federal Rule of Civil Procedure** , hereinafter referred to as **F.R.C.P.** 16, the trial court ordered the Petitioner to produce an expert report from an expert, which had not yet been obtained. [Emphasis added]. The trial court designated this expert to be an endocrinologist who would show the causal connection between the Petitioner's medical condition and the drug, which is the object of this suit. Petitioner's treating physicians (neurologists) were prohibited by the court from providing an expert report in this regard. Petitioner was unable to acquire such an expert, with knowledge of the drug's effects on the pituitary in the short period of time set by the court, although approximately 28 persons were contacted (See Doc.#

8,12-Appendix 4 & 5).

Petitioner asserts that the court was without authority under **F.R.C.P.** 16 and 26 to make such an order and to dismiss Petitioner's cause. Moreover, the Petitioner was wholly prohibited from obtaining discovery from Respondents which would have provided answers to the questions raised by the court regarding the causal connection between the drug, Synarel, which was the object of the suit, and Petitioner's injuries.

Any inherent authority granted pursuant to the **Federal Rules of Civil Procedure** do not extend to mandating that a Petitioner conduct certain discovery. The court's action violated the due process rights of Petitioner, denied her equal protection under the laws, and denied her access to the courts to redress her grievances as guaranteed by the United States Constitution.

The trial court dismissed Petitioner's cause of action "on Syntex's motion." (Doc. # 28). Respondent's Motion to Dismiss seeks dismissal pursuant to **F.R.C.P.** 37(b)(2), on the basis that Petitioner failed to comply with the court's order for the production of an expert report and the production of medical records. Because the medical records had been obtained by appropriate discovery methods by Respondent at the time of the issuance of the court's order of Dismissal on December 05, 1997,(Doc # 37, Appendix 3) as evidenced by its taxation of costs (Doc# 38), it appears clear that the basis for the dismissal was the failure to produce the expert report.

The trial court and Respondents attempt to paint a picture of contumacious conduct on the part of the Petitioner, in order to justify its order of dismissal, specifically stating that Appellant failed to obey

the foregoing court order, in spite of the evidence which Petitioner proffered to show an inability to comply. (See June Simon Transcript-pages 16-18, line 3). In light of the contentions raised by the Respondents, the Court of Appeals for the Fifth Circuit failed to address the flagrant disregard of the rules pertaining to discovery by the trial court and pretrial conferences pursuant to the **Federal Rules of Civil Procedure**, and focused on the court's inherent power to manage its docket. (See Appendix 2).

Because the power of the court in managing and controlling its docket is not an unbridled grant of authority, which allows the disregarding of the due process rights guaranteed under the **United States Constitution,** this Honorable Court must grant certiorari to review the decisions of the lower courts and grant summary reversal, as set forth below.

Petitioner, in keeping with the Supreme Court's ruling in **Link v. Wabash R.R.**, 370 U.S. 626, 629-630, 82 S.Ct. 1386,1388 (1962), acknowledges that the court has a substantial inherent power to control and manage its docket. However, that power must be exercised in a manner consistent with the Federal Rules of Civil Procedure. "Those rules are the product of a careful process of study and reflection designed to take "due cognizance both of the need for expedition of cases and protection of individual rights." See **Strandell v. Jackson County, Ill.** 838 F.2d 884 (C.A. 7 1988) citing **S.Rep. No.** 1744, 85th Cong., 2d Sess., reprinted in 1958 **U.S. Code Cong. & Admin. News**, 3023, 3026.

28 U.S.C. § 2072, known as the *Rules Enabling Act* provides in pertinent part:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district court..... and courts of appeals.

(b) Such rules shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect.

In the instant case, these rules have been annihilated by the trial and appellate courts to the degree that the Petitioner's rights have not only been abridged, but has been subverted as well.

The **Seventh Amendment of the United States Constitution** provides that a citizen of the United States shall be afforded a trial by jury. More specifically, said Amendment provides in pertinent part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Therefore, the inherent authority granted the court, does imbue the trial judge to become the fact-finder, as that authority lies within the hands of the jury.

Neither, **F.R.C.P.** 16, nor **Rule** 26 allow the court, through its inherent power to mandate that a party obtain an expert. The rules do not mandate that the party must rely on an expert to prove up its case. Moreover, the foregoing rules do not mandate that a party engage in discovery. The rules simply allow the court to initiate a plan to control, schedule and complete discovery.

In **Identiseal Corp. Of Wisconsin v. Positive Identification Systems, Inc.**,560 F.2d 298(7thCir.. 1977) the trial court dismissed plaintiff's cause of action because it determined "that the pretrial work necessary to efficiently try this action had not been done" and ordered that the case be dismissed for want of prosecution, upon the failure of the attorney to prepare a final pretrial report, as ordered.

The attorney "made a considered judgment that discovery would in no way be beneficial to the plaintiff's interest and would at most be of some significant support or assistance to defendant." He determined that his client's chances would be maximized if he did not conduct discovery, but developed his entire case at trial.

The Court of Appeals made this finding:

> Discovery in lawsuits in the federal courts is governed by Rule 26 to 37 of the **Federal Rules of Civil Procedure**. Although these rules provide for judicial intervention to settle disputes about the scope of discovery and to enforce a legitimate request by one party for information or documents from another party, ***they do not give district judges the authority to compel a litigant to engage in discovery in the first place***. Id at 301. [Emphasis added]

The Court in **Identiseal** recognized the right of the district court to "advance the cause and simplify the procedure before the cause is presented to the jury" citing **O'Malley v. Chrysler Corp.**, 160 F.2d 35,36 (7th Cir. 1947), however, the court recognized that this

right was not unlimited.

Likewise, the trial court in **Fidelity and Deposit Co., Inc. v. Joseph Oat Corp.**, 859 F.2d 501.5093 (7th Cir. 1988) citing **Identiseal** stated that the district court has no authority to make a party take discovery.

In the case at bar, it was clear from data held by Respondents that Petitioner could fully develop her case through questioning Respondents experts and those parties who had performed empirical studies and developed data for and on behalf of Respondent, as provided by **F.R.C.P.** 26(a)(1)(B); (a)(2)(A); and (b)(4)(A),(B). The district court, through its mandate deprived Petitioner of that right.

Even the 1993 Amendments to the **Federal Rules of Civil Procedure** which allows the trial court to issue orders limiting the time for discovery and the control and scheduling of discovery (See **F.R.C.P.** 16(b)(3);(c)(6), the amendments do not give the trial court the power to order a litigant to make discovery. **F.R.C.P.** 26 specifically provides what disclosures shall be made, however, it does not compel a party to obtain an expert.

Identiseal is directly on point with the case at bar. Moreover, in the case at bar, it is clear that **F.R.C.P.** 26(a)(2)(B) clearly provides that a party is to disclose an expert which has been ***retained or employed*** to provide expert testimony.[Emphasis added]. The rule fails to provide that a party may be compelled to obtain such an expert, in the event that one has not been obtained. **F.R.C.P.** 37(c) clearly provides that the sanction for failing to designate a witness is the exclusion of said witnesses testimony at trial, not the dismissal of

a party's cause of action.

The 7th Circuit further recognized the limitations on the trial court as it relates to pretrial conferences. It recognized that under Rule 16, the district court does not have the power to dismiss a case based upon a party's refusal to follow the judge's wishes expressed at the pretrial conference, unless the failure to follow his wishes could be characterized as a "failure to prosecute." Id at 302, citing **J.F.Edwards Construction Co. v. Andersen Safeway Guard Rail Corp.,** 542 F.2d 1318 (7th Cir. 1976).

The Court further determined that its decision was not predicated solely on "the absence of express authority in Rule 16 authorizing compulsory discovery", but also that "the parties, rather than the court, should determine litigation strategy."

Likewise, the Court's mandate, that Petitioner obtain its own medical records and submit them to Respondents, in spite of the agreement of the parties (App.6) and in contravention of **Federal Rules of Civil Procedure** 16, 26, 29,31, and 34 evidence another instance, in which the trial court exceeded the grant of authority afforded it pursuant to those rules and interfered with the litigation strategy of the parties. Specifically, the Respondents could obtain any information it needed from the obtaining of Petitioner's medical records through a records service pursuant to **Federal Rules of Civil Procedure** 31, as per agreement of the parties (Appendix 7) and as Respondents had been doing, as evidenced by Doc # 38, rather than the court ordering the Petitioner to traverse the State of Texas to obtain records to submit to Respondent in a legally admissible form. Moreover, it appears clear that the court's order required duplicity of

effort, funds, and were in contravention of the **Federal Rules of Civil Procedure** 29 and/or 31, in obtaining that information.

The Fifth Circuit's failure to appropriately apply the **Federal Rules of Civil Procedure** and the **Seventh Amendment** to the **United States Constitution** resulted in the abridging of Petitioner's rights and the violation of **28 U.S.C. 2072**, as well as due process guarantees under the **U.S. Constitution, 14th Amendment.**

2. **THE FIFTH CIRCUIT'S DECISION MUST BE OVERTURNED, IN THAT THE INHERENT AUTHORITY GRANTED TO THE TRIAL COURT TO MANAGE AND CONTROL ITS DOCKET, DOES NOT PERMIT THE DENIAL OF DUE PROCESS IN SO DOING, BUT RATHER MANDATES AN EQUAL PROTECTION OF THE LAWS AS IT PERTAINS TO A REDRESSING OF GRIEVANCES.**

Certainly a grant of authority to a trial court to manage and control its docket under the **Federal Rules of Civil Procedure** does not allow the prohibition of one party to obtain discovery of relevant information, until another party has complied with an order, albeit a void or voidable order. The Court prevented the Petitioner from engaging in meaningful discovery which was necessary to develop the facts and theories of her case.

The trial court and the Respondents prevented the Petitioner from discovering information relevant and pertinent to the development of facts and theories in this case through the trial court's denial of discoverable information and the Respondent's failure to disclose

information pursuant to the *Initial Disclosure* provisions of the **Federal Rules of Civil Procedure** 26(a).

Specifically, the trial court denied Petitioner's right to obtain any disclosures or discovery,(See June Simon Transcript pgs. 15-18, line 3; page 27 lines 5-9; page 24, lines 7-19) until Petitioner provided an expert report explaining the causal connection between Petitioner's medical condition and the drug (App. 4 and 5).

Empirical studies, drug interaction analyses, and New Drug Reports had been tendered to the Food & drug Administration as required by law for new drugs., and as evidenced by the information contained in Doc.# 11. Information showing the causal connection between the drug and Petitioner's injuries were in the hands of Respondents, but prohibited from discovery by the trial court. (See June Simon Transcript pgs. 15-18, line 3; page 27 lines 5-9; page 24, lines 7-19).

In the article, **Mandatory Disclosure and Equal Access to Justice; The 1993 Discovery Rules Amendments, and the Just, Speedy, and Inexpensive Determination of Every Action.** 67 Temple Law Review 179 (1994), author Virginia Hench states that in cases where the Defendant controls most of the information, such as in employment discrimination, civil rights and toxic tort cases, the burden on the Plaintiff should not be underestimated, as same will result in a "drastic curtailment of access to the courts for disadvantaged litigants".

The orders of the district court which refused Petitioner the right to obtain discovery and disclosure from Respondents, until Petitioner had produced an expert report, in contravention of the

Federal Rules of Civil Procedure 26(a) and 26(d), along with the Respondents failure and refusal to provide disclosures, produce any of the information requested by Petitioner, Respondent's refusal to provide meaningful disclosures and discovery, and the subsequent dismissal of Petitioner's cause constituted a denial of access to the courts and the denial of due process of law in contravention of the **United States Constitution, Amendment 1** which provides as follows:

> Congress shall make no law respecting an establishment of religion.....; or abridge.... the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

Likewise the **Fourteenth Amendment of the United States Constitution** provides in pertinent part:

> .....No state shall make or enforce any law of the United States which shall abridge the privileges and immunities of the Citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The Sixth Circuit, in **Swekel v. City of River Rouge**, 119 F.2d 1259 (C.A. Mich. 1997) holds that "it is beyond dispute that the right of access to the courts is a fundamental right protected by the

Constitution" as guaranteed by the 14th Amendment, Equal Protection Clause, First Amendment and Privileges and Immunities Clause of the United States Constitution , citing **Wolff v. McDonnell**, 418 U.S. 539, 579, 94 S. Ct. 2963, 2986 (1974) [14th Amendment]; **Pennsylvania v. Finley**, 481 U.S. 551,557, 107 S. Ct. 1990,1994 (1987)[Equal Protection]. Said case further indicates that any actions that effectively covers up evidence, such that it renders a party's state court action ineffective violates his rights to access to the courts. Id at 1262. Likewise, the Fifth Circuit held that the delay created by defendants could be a constitutional deprivation, if the conduct prejudiced the plaintiff's chance of recovery in **Ryland v. Shapiro**, 708 F.2d 967 (5th Cir. 1983). In the case at bar, that is exactly what occurred and the Fifth Circuit's decision in the case at bar conflicts with its own ruling in **Ryland**.

Moreover, the mandate that researchers for Respondents enter into an agreement in which information about the product Synarel, which is the object of this suit, could not be used in preparing an expert report for any person or party other than Respondents, constitutes a covering up of evidence, which effectively denied Petitioner equal access to the courts, due to the inability to discover that information

Consequently, the Fifth Circuit's ruling fundamentally misinterprets the trial court's grant of authority to manage and control its docket by dismissing Petitioner's claim for the failure to produce documents (an expert report) not in existence in response to a void or voidable order and not required to be produced, while at the same time allowing Respondents to disobey orders and fail to produce documents

in existence and required to be produced under **F.R.C.P.** 16, 26a, and 33.

3. **THE TRIAL COURT MAY NOT DISMISS A CASE FOR FAILURE TO COMPLY WITH AN ORDER WHEN A PARTY HAS SHOWN INABILITY TO COMPLY, RATHER THAN A FLAGRANT DISREGARD FOR THE ORDER.**

Petitioner attempted to make a good faith effort to comply with the court's orders. Petitioner noticed the court of the inability to obtain, an expert, as ordered, within the time frame designated by the court. The court decided that dismissal would be the appropriate remedy for refusal to comply, in contravention of **F.R.C.P.** 16(e) which provides an "order following a pretrial conference shall be modified to prevent manifest injustice"

It was manifest injustice to Petitioner to impose more stringent deadlines, than those agreed to by the parties and in contravention of **F.R.C.P.** 26 (2)(c). However, the Respondents never alleged or made a showing that manifest injustice would be imposed upon them due to delay in obtaining an expert report. In fact, the parties, agreed to a date of almost one year after the date deemed necessary by the court, in its Joint Meeting and Discovery Management Plan held prior to the first pretrial conference with the court. (See Doc. #7). Therefore, the court's ruling replaced the development of the parties case as they deemed proper in contravention of **F.R.C.P.** 29.

The trial court abused its discretion in mandating an order for an expert which was void, as a matter of law, could not be complied with by the very language contained therein (See Doc.# 12, Appendix

5, June Simon Tr., pg. 12, lines 9-19) in that showing a causal connection between something unreasonable and unanticipated is an oxymoron.

It is clear that the court substituted its judgment for the judgment of the litigants in this cause, which is not a part of the trial court's inherent authority as set forth above.

4. **THE FIFTH CIRCUIT INCORRECTLY INTERPRETED THE TRIAL COURT'S GRANT OF AUTHORITY TO ORDER DISMISSAL AS SANCTIONS FOR FAILURE TO OBEY AN ORDER, WHEN SUCH DISMISSAL RESULTS IN A DENIAL OF DUE PROCESS.**.

Petitioner has shown, as set forth above, that the court was without authority to enter the orders upon which the Petitioner's cause was dismissed. A proceeding which summarily dismisses a party's cause of action, be it a dismissal for sanctions, summary judgment, or any other form of dismissal which summarily adjudicates a case on the merits may result in a denial of due process.

The Appellate court for the 9th Circuit in Wanderer v. Johnston, 910 F.2d 652, 656 (C.A.9 (Cal) 1990) stated the following:

> We have found the element of prejudice to be essential, stating that sanctions which interfere with the litigants' claim or defenses violate due process when they are imposed "merely for an infraction that did not threaten to interfere with the rightful decision in the case" citing Wyle v. R.J. Reynolds

> **Industries, Inc.**, 709 F.2d 585, 591 (9th Cir. 1983). Delay alone, without focus on its effects, will not justify dismissal or default.

In the instant case, failure to produce the expert report would have only caused a delay in disclosing Petitioner's expert which is anticipated by **F.R.C.P.** 26(a)(2)(C), in that said report is expected 90 days prior to trial. Dismissal for failure to produce an expert report, not yet in existence interfered with a proper decision in the instant case.

The Supreme Court of the United States has recognized that the courts have the power to dismiss a case for disobedience of a discovery order in **National Hockey League v. Metropolitan Hockey Club, Inc.**. 427 U.S. 639, 640, 96 S. Ct. 2778, 2779 (1976), however, the court recognized that the decision of the trial court must be reversed, if the trial court abused its discretion in so dismissing a cause.

The Court in **National Hockey League** following its decision in **Societe Internationale v. Rogers**, 357 U.S. 197,212, 78 S. Ct. 1087,1096 (1958) stated:

> [That Rule 37] should not be construed to authorize dismissal of (a) complaint because of petitioner's noncompliance with a pretrial order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

Petitioner, clearly established to the lower court that she was unable to obtain the expert and expert report from an endocrinologist which conformed to the directive of the court, within the time frame directed by the court. Separate and apart from whether the court had the power to issue such an order (as set forth above), Petitioner, was unable to obtain the expert report as ordered. Moreover, **F.R.C.P.** 37 does not allow for the dismissal of a cause until a Motion to Compel has been requested. No such Motion had been requested by the Petitioner's in this cause.

The trial court clearly abused its discretion in granting a dismissal and denied the Petitioner due process and equal access to the courts as guaranteed by the United States Constitution.

Petitioner would further show that the grant of dismissal in a cause where the nonproduction of an expert report at the initial stages of the litigation, which did not adversely affect the Respondents, is wholly repugnant to the grant of a jury trial, as guaranteed by the **Seventh Amendment to the United States Constitution**, as well as the denial of due process under the **Fourteenth Amendment.**

5. **THE FIFTH CIRCUIT ERRED IN DETERMINING THAT DISMISSAL WAS WARRANTED DUE TO THE ALLEGED DISOBEDIENCE OF A COURT ORDER BY PETITIONER, WHILE FAILING TO REVIEW THE BIAS AND LACK OF IMPARTIALITY ON THE PART OF THE TRIAL JUDGE WHICH RESULTED IN A DENIAL OF DUE PROCESS AND LACK OF ACCESS TO THE COURTS TO REDRESS PETITIONER'S GRIEVANCES.**

The pretrial procedures were so fraught with prejudice from the trial court that Petitioner was unable to receive an impartial tribunal to redress her grievances as guaranteed by the United States Constitution.

Petitioner, in the trial court, sought a Motion for Recusal after a hearing on October 17, 1997. (See Doc. # 29) The trial court refused to recuse itself and denied Petitioner's Motion. (See Doc. # 32).

Petitioner sought the recusal of the trial judge due to 1) his entry of orders which were impossible to comply with; 2) his refusal to recognize the agreement of the parties; 3) his refusal to allow discovery to be had pursuant to the rules, in mandating that Petitioner obtain all her own medical records in duplication of the process already being used by Respondent to obtain them; 4) his refusal to allow Petitioner to obtain discovery and disclosure from Respondents until she produced an expert report, in contravention of the **Federal Rules of Civil Procedure** 26(a),(d) ; 5) and his characterizations of the case as one of extortion , among other comments (See Tr. Of June Simon- page 9, 15, 7-8, remainder of transcript in its entirety) and 6) because Petitioner was prohibited often from responding, explaining, or addressing issues of concern to the court.

Petitioner then sought Mandamus relief from the United States Court of Appeals, alleging among other things that the trial judge's refusal to recuse himself would result in "material and identifiable harm" to the Petitioner's case, and a sua sponte dismissal of the case, with said Writ of Mandamus being received by the trial court on the same date that it dismissed Petitioner's cause of action.

> A fair trial before a fair and impartial tribunal, whether a court or administrative agency , is a basic requirement of due process. "Not only is a biased decision maker ***constitutionally unacceptable***, but our system of law has always endeavored to prevent even the probability of unfairness'". **Baran v. Port of Beaumont Nav. Dist. of Jefferson County, Tex.**, 57 F.3d 436 (C.A.5 (Tex) 1995).
>
> [Emphasis added]

The Supreme Court in **Marshall v. Jerrico, Inc.**, 446 U.S. 238,240, 100 S.Ct. 1610, 1612 (1980) stated that "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." The court expounded that neutrality is central to due process concerns in order to prevent "unjustified and mistaken deprivations" and to promote participation and dialogue by "affected individuals in the decision making process."

"The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." Id at 1613.

The Court in **Marshall** relied on **Offutt v. United States**, 349 U.S. 11, 75 S.Ct.11 (1954), a case in which the appellant and the trial judge engaged in verbal combat. The court reviewed the actions of the judge and noted an "infusion of personal animosity". The Court

determined, in this contempt case. "Justice must satisfy the appearance of justice", therefore, the judge should have appointed another judge to hear the contempt matter, following the reasoning in **Cooke v. United States**, 267 U.S. 517,342, 45 S.Ct. 390,394 (1925).

The failure of the trial judge to remove himself from this cause constituted a denial of due process to Petitioner.

6. **FINALLY, THE APPELLATE COURT ERRED IN FAILING TO ADDRESS PETITIONER'S ISSUE REGARDING THE TAXING OF COSTS FOR THE OBTAINING OF MEDICAL RECORDS OF PETITIONER VIA DEPOSITION ON WRITTEN QUESTIONS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 31.**

The record is wholly silent from the Fifth Circuit in this regard.

Respondents presented a Bill of Costs in the amount of $6029.35, seeking to tax all costs of discovery of Petitioner's medical records against Petitioner. (See Docket Sheet Entry #45). The Court granted same. (Doc.# 45 Petitioner objected.

28 U.S.C. § 1920 provides that a judge or clerk of any court of the Unites States may tax as costs the following:

(1) Fees for the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Docket fees under section 1923 of this title

(5) Compensation of court appointed experts.....

Petitioner would show that all costs incurred by Respondents were investigative costs in obtaining Petitioner's medical records. Most of the records were obtained through Depositions on Written Questions. Moreover, the Respondents exceeded the number of Depositions allowed by law pursuant (10) to the **F.R.C.P.** (a)(2)(A), therefore the trial court abused its discretion in mandating that Petitioner pay them.

The Court in **Echostar Satellite Corp. v. Advance Communications Corp.**, at 902 F.Supp. 273 (D.Colo. 1995) has held that costs of depositions taken for discovery and investigative purposes were properly disallowed. The Courts have further held in other districts that depositions may not be taken purely for the convenience of attorney or be investigative in nature, and be taxable as costs. **NLFC, Inc. v. Devcom MidAmerica, Inc.**, 916 F.Supp. 751 (N.D.Ill 1996). The court in **Todd Shipyard's Corp. V. Turbine Service, Inc.**, 592 F.Supp. 380 (D.C.La 1984) held that depositions taken solely for discovery purposes were not taxable costs.

Given, the foregoing, Petitioner would show that the Court abused its discretion in taxing the costs of discovery of Petitioner's medical records against Petitioner. Petitioner properly filed a contest to same (Doc.# 41) stating in addition to the foregoing that Appellee sought records which were irrelevant and , records which had already been produced, thereby inflating the costs.

Moreover, when Respondents sought costs for production of these records, during a hearing in which Petitioner was not present, the Court denied them. (See Ann Traylor transcript pg. 6, lines 12-19).

Given, the foregoing, the Court abused its discretion in taxing

costs of discovery against Petitioner.

CONCLUSION

There is no basis for allowing the trial court to use its inherent powers to dismiss a cause in order to control or manage its docket or when it encounters a litigant whom it deems unpalatable. To deny a redress of grievances through the courts to any individual with whom the court disagrees erodes the very Constitution of this country. The decision of the trial and appellate court so squarely collides with this Court's decisions, as well as those of other circuits, that review should be granted, with summary reversal for an appropriate decision.

Beyond the federal questions raised by this litigation, this case raises important implications of public interest for anyone who has taken the drug, Synarel, which is the object of this suit. Dismissal and failure to disclose pertinent information under the guise of discovery can not be afforded deference at the expense of every other individual who is not aware the latent or patent effects of this drug, due to the manufacturer's failure to properly notice the public.

Respectfully submitted,

Veronica L. Davis
Petitioner Pro Se
222 N. Mattson
West Columbia, Texas 77486
(409) 345-2953
(409) 345-5461 Telecopier

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7.	Docket Sheet of the trial court	

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO.98-20046

VERONICA L. DAVIS Filed August 10,1998

Plaintiff-Appellant

v.

SYNTEX LABORATORIES, INC.; ROCHE BIOMEDICAL LABORATORIES, Inc.

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before POLITZ, Chief Judge, WEINER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/S/ Henry A. Politz

United States Circuit Judge

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED JUL 08,1998

No. 98-20046

Summary Calendar

VERONICA L. DAVIS Plaintiff-Appellant

versus

SYNTEX LABORATORIES, INC.;

ROCHE BIOMEDICAL LABORA-

TORIES, INC., Defendants-Appellees

Appeal from the United States Court

For the Southern District of Texas

H-97-CV-177

Bwfore POLITZ, Chief Judge, WEINER AND EMILIO M. GARZA, Circuit Judges.

PER CURIAM*

*Pursuant to the 5th CIR. R 47.5, the court has determined that this opinion should not be published and is not precedent under the limited circumstances set forth in the 5th CIR R.47.5.4.

Veronica Davis, an attorney, acting *pro se*, appeals the district courts's dismissal of her complaint, with prejudice. For reasons assigned, we affirm.

Background

In this diversity action. Davis alleges that she was injured by a d drug manufactured by the defendant At the first status conference, the district court ordered Davis to produce her medical records and to provide reports from expert establishing the causal link between the drug and her condition. In a similar case involving Davis, we detailed the "long and tortured course" of the litigation prior to affirming the district court.[1] We are unwilling to similarly recount the facts in this case. We have, however, fully reviewed the record and the briefs. Suffice to say, that the record establishes Davis' failure to comply with court orders, failure to attend scheduled status conferences, and a warning by the court that further failure to comply with its orders would result in dismissal. Davis thereafter failed to attend a hearing scheduled at her request and the court dismissed her case with prejudice, ultimately awarding the defendant $6029.35 in costs. Davis appeals, contending *inter alia*, that the district court abused its discretion in ordering the dismissal.

Analysis

---

[1]**Woodson v. Surgitek.**, 57 F.3d 1406, 1407-1416 (1995).

Our trial courts are vested with the inherent power to manage their dockets in order to dispose of cases in an efficiently and orderly manner.[2] This authority necessarily includes the power to dismiss a case as a sanction for a party's failure to obey court orders.[3] Although we recognize that dismissal is a harsh sanction, we will uphold an involuntary dismissal, with prejudice, unless the district court abused its discretion. In this instance, it is beyond peradventure that Davis willfully abused the judicial process and we believe that the court acted well within its discretion and showed considerable restraint in handling this matter. For the foregoing reasons, the judgment of the district court is AFFIRMED.

---

[2]**Link v. Wabash R. Co.**, 370 U.S. 626 (1962).

[3]**Woodson** at 417

APPENDIX 3

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

VERONICA L. DAVIS	§	
Plaintiff	§	
	§	
	§	CIVIL ACTION NO.
versus	§	H-97-177
	§	
SYNTEX LABORATORIES INC.	§	December 8, 1997

Order of Dismissal

On Syntex's motion, this case is dismissed with prejudice. (28#)

Signed December 5, 1997, at Houston, Texas.

/s/ Lynn Hughes

United States District Judge

#37 Filed Dec. 8, 1997

APPENDIX 4

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

Filed Jun 13, 1997

DAVIS § H-97-177

verus

SYNTEX

CONFERENCE MEMORANDUM

Appearances

Counsel:	Representing:
Veronica Davis	Plaintiff
Richard Josephson	Defendant

6-9-97

At the conference, these rulings were made:

Davis must produce all her medical records and provide reports from the doctors that can explain the causal link between the drug and her condition by June 30, 1997.

Doc# 8

APPENDIX 5

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

Filed Sep 8, 1997

DAVIS	§	H-97-177
verus	§	
SYNTEX	§	

CONFERENCE MEMORANDUM

Appearances

Counsel:	Representing:
Veronica Davis	Plaintiff
Richard Josephson	Defendant
Mark L. Walters	

9-8-97

At the conference, these rulings were made:

(1) Davis will deliver all her medical records to Syntex by noon Wednesday, 9-17 or her case will be dismissed as she has refused to produce them neither did she return Syntex'a authorization.

(2) An endocrinologist who has seen Davis's medical records will deliver to Syntex a "Daubert" report with an admiss[a]ble opinion by 10.31.97 connecting Davis's problems to unreasonable & unanticipated harm to her pituitary.

#12 4:97cv00177 #12 Pg.

APPENDIX 6

[Letterhead names omitted in printing]

Baker & Botts
Richard L. Josephson
3000 One Shell Plaza
910 Louisiana
Houston, Texas 77002

June 24, 1997

Via U.S. Mail and Facsimile Transmission

Re: **H-97-177; Veronica L. Davis vs. Syntex Laboratories, Inc. & Roche Biosciences**

Dear Mr. Josephson,

This is to confirm our conversation on June 09, 1997 in the Federal Court building lobby regarding the production of Plaintiff's expert reports and the production of medical information.

You indicated that the submission of an expert report some time prior to the September 08, 1997 would be sufficient, due to the vacation schedules of all persons involved, including the Honorable Lynn Hughes. I indicated that I would make every effort to meet with the Court's date of June 30, 1997. Even though every effort is being made to comply with the date of June 30, 1997, that the places an onerous burden on me and my experts. As previously discussed, I am awaiting some information from the Food & Drug Administration. Rushing the report may result in amendments and revisions. In order to avoid that, may we agree to the date of

August 30,1997. Same is acceptable to you, please find an agreed order attached to a Motion to Extend Time to Designate Experts attached for your review and signature.

Additionally, you stated there was no need to obtain medical records from all sources as directed by the Judge Hughes, as an executed medical authorization would prove sufficient. I have obtained a number of records already, at his direction, and will be forwarding same to you in response to your discovery requests. However, I will execute a medical authorization for other relevant.

A review of your Initial Disclosure reveals a failure of the Defendant to disclose individuals with relevant information. Clearly, the purpose of said is to reveal to the Plaintiff, the names of persons known to the Defendant, employed by the Defendant, or who will be called by the Defendant regarding matters relevant to the case. A simple regurgitation of the Plaintiff's list of potential witnesses violates the spirit of the rule. I would appreciate your immediate responsiveness to this matter, by providing the appropriate disclosures as required by Federal Rule 26

Please note that I have changed telephone numbers. All previous correspondence has these numbers reversed. There was an incorrect telephone switching designation of some sort.

Office telephone:	(409) 345-2953
Facsimile transmission:	(409) 345-5461

The number listed on the stationary is no longer a valid line.

Thank you in advance for your consideration in these matters.

Sincerely,

Veronica L. Davis

U. S .District Court

TXS-Southern District of Texas (Houston)

CIVIL DOCKET FOR CASE #:97-cv-177

CLOSED APPEAL

Davis v. Syntex Laboratories, et al — Filed:01/21/97

Assigned to: Judge Lynn N. Hughes — Jury Demand:Defendant

Demand: $50,000 — Nature of Suit: 365

Dkt# in other court: None — Jurisdiction: Diversity

Cause: 28:1332 Diversity-Product Liability

VERONICA L. DAVIS
plaintiff

Veronica L. Davos
409-345-5461 fax
[COR LD NTC]
Attorney at Law
West Columbia, TX 77486
409-345-2953

v.

SYNTEX LABORATORIES, INC.
defendant

Richard L. Jospehson
713-229-1522
[COR LD NTC]
Baker & Botts
910 Louisiana
Ste 3000
Houston, TX77002-9934

ROCHE BIOMEDICAL LABORATORIES, INC.
defendant

Richard L. Jospehson
(See above)
[COR LD NTC]

Docket as of March 5, 1998 9:55 a.m Page 1 Non-Public

CLOSED APPEAL

INTERNAL USE ONLY: Proceedings include all events.
4:97cv177 Davis v. Syntex Laboratories, et al

VERONICA L. DAVIS
plaintiff

v.

SYNTEX LABORATORIES INC.; ROCHE BIOMEDICAL LABORATORIES, INC.
Defendant

Docket as of March 5, 1998 9:55a.m. Page 2 NON-PUBLIC

§

CLOSED APPEAL
INTERNAL USE ONLY: Proceedings include all events.
4:97cv177 Davis v. Syntex Laboratories, et al

1/21/97	1	COMPLAINT filed; FILING FEE $150.00 RECEIPT # 463998 (BKJ) [Entry date 01/22/97]
1/21/97	2	ORDER for Conf set initial pretrial and scheduling conference for 1:30 6/9/97 before Judge Lynn Hughes, entered; Parties notified.(bj) [Entry date 01/22/97]
1/21/97	--	**Added for Veronica L Davis attorney Veronica L Davis (bj) [Entry date 01/22/97]
2/20/97	3	Pltf's AMENDED COMPLAINT by Veronica L Davis, amending 1-1 complaint filed.(fs) [Entry date 02/24/97]

3/7/97	4	ANSWER to Complaint by Syntex Laboratories, Roche Biomedical (Added attorney Richard L. Josephson), filed. (hl) [Entry date 03/10/97]
3/11/97	5	DEMAND for jury trial by Syntex Laboratories, filed (hl); [Entry date 03/12/97]
5/23/97	6	REQUIRED DISCLOSURE Pursuant Rule 26, filed (ks) [Entry date 05/27/97]
6/2/97	7	Report of Meeting and Joint Discovery/Case Management Plan by Veronica L Davis, Syntex Laboratories, filed (hl) [Entry date 06/03/97]
6/9/97	8	CONFERENCE MEMORANDUM entered; terminated deadline; Appearances: Veronica Davis f/pltf; Richard Josephson f/deft; pltf must produce medical records and provide the reports from doctors that can explain causal link between the drug and her condition by 6/30/97; SETTING pretrial conference for 11:30 9/8/97 before Judge Lynn N. Hughes. Parties ntfd. (signed by Judge Lynn N. Hughes) (nd) [Entry date 06/13/97]
6/25/97	9	MOTION to extend time to file expert report by Veronica L Davis, Motion Docket Date 7/15/97 [9-1] motion filed (hl) [Entry date 06/26/97]
6/27/97	10	ORDER entered GRANTING pltf's [9-1] motion to extend time to file expert report; SETTING pltf's expert report due 9/5/97; Parties notified (signed by Judge Lynn N. Hughes) (nd) [Entry date 06/30/97]
6/27/97	__	RESPONSE by Veronica L Davis to [10-2] order to produce reports from doctors, filed (lb) [Entry date 9/8/97]

9/5/97	11	RESPONSE by Veronica L Davis to [10-2] order to produce reports from doctors, filed. (Lb) [Entry date 09/08/97]
9/5/97	--	**Terminated deadlines (lb) [Entry date 09/08/97]
9/8/97	12	CONFERENCE MEMORANDUM held; App: Davis, Josephson and Walters; terminated deadlines, set pretrial conference for 3:30 11/10/97, Davis will deliver all her medical records to Syntex by 9/17/97...,entered. Parties ntfd. (Signed by Lynn N. Hughes) (hl)
9/10/97	13	MOTION to compel, and for sanctions by Veronica L Davis, Motion Docket Date 9/30/97 [13-1] motion, 9/30/97 [13-2] motion, filed. (Hl) [Entry date 09/11/97]
09/12/97	14	MOTION for hearing on Ct.'s Order by Veronica L. Davis, Motion Docket Date 10/2/97 [14-1] Motion for hearing on Ct's order, [13-1] motion to compel, and for [13-2] motion for sanctions, entered; {Parties notified. (Signed by Judge Lynn Hughes) (hl)
09/12/97	15	MOTION for protective order by Veronica L Davis, Motion Docket Date 10/2/97 [15-1], filed (h
09/29/97	16	ORDER Motion hearing set for 9:30 10/9/97 for [15-1} motion for protective order [14-1] motion for hearing on Ct's order, [13-1] motion to compel, and for [13-2] motion for sanctions entered. Parties notified. Signed by Lynn N. Hughes) (hl)
10/2/97	17	RESPONSE by Syntex Laboratories, Roche Biomedical to [13-1] motion to comple,[13-2] motion for sanctions, filed (hl) [Entry date

10/03/97]

10/2/97 18 RESPONSE by Syntex Laboratories, Roche Biomedical to [15-1- motion for protective order, filed (hl) [Entry date 10/3/97]

10/2/97 19 RESPONSE by Syntex Laboratories, Roche Biomedical to [14-1] motion for hearing on Ct's order, filed [Entry 10/03/97]

10/2/97 20 ORDER Motion hearing set for 11:00 10/17/97 for [15-1] motion for protective order, [14-1] motion for hearing on Ct's order, [13-1} motion to compel and for [13-2} motion for sanctions, entered; Parties notified (signed by Judge Lynn N. Hughes) (hl) [Entry date 10/03/97]

10/17/97 21 AMENDED MOTION for protective order by Veronica L Davis, Motion Docekt Date 11/6/97, filed (hl)

10/17/97 22 MOTION to quash deposition by written questions by Veronica L. Davis, Motion Docekt Date 11/6/97 [22-1] motion, filed. (hl)

10/17/97 23 AMENDED MOTION for hearing on Ct's Order motion to vacate the Ct's order by Veronica L Davis, Motion Docket Date 11/6/97 [23-1] motion, filed (hl)

10/17/97 25 Minute entry; motion hearing held before Judge Lynn N Hughes on 10/17/97, terminated deadlines. Apps: Davis pro se, Walters f/deft. Davis' [13-11 motion to compel production from Syntex is quashed; Davis' [22-1] motion to quash deposition by written questions {15-1] motion for protective

order and [12-l} amended motion for protective order are denied: All motions not expressly decided are denied without prejudice:-denying Davis' [13-2] motion for sanctions, [14-1] motion for hearing on Ct's Order and [23-11 amended motion for hearing on Ct's Order. The deadline for 10/31/97 for the production of expert reports subsists. Syntex must produce a copy of its medical reports, Davis must furnish a list of every health care provider she has seen by noon 10/21/97. Syntex will send questions about Davis, coverage. Davis' oral motion to recuse is denied. If Davis does not comply with Court's .orders, this case will be dismissed without prejudice, A pretrial conference is set for 4:00 11/10/97. Ct Reporter: June Simon (lt)

10/23/97 24 ORDER set pretrial conference for 4:00 11/10/97 for 4:00 11/10/97 entered; Parties notified (signed by Judge Lynn N. Hughes) (hl)

10/23/97 26 RESPONSE by Veronica L. Davis to [12-4] order to provide the name of medical providers, filed (hl)

10/31/97 27 MOTION for reconsideration, or to vacate [12-4] order by Veronica L Davis, Motion Docket Date 11.20.97 [27-1] motion, 11/20/97[27-2] motion, filed (ps) [Entry date 11/03/97]

11/4/97 28 MOTION to dismiss by Syntex Laboratories, Motion Docket Date 11/24/97 [28-1] motion, filed.

11/5/97 29 MOTION to disqualify judge by Veronica L Davis, Motion Docket Date 11/25/97 [29-1] motion, filed

11/7/97 30 ORDER Motion hearing for 3:30 12/4/97 for 3:30 12/4/97 for [29-1] motion to disqualify judge, set for 3:30 12/4/97 for [28-1] motion to dismiss set

for 3:30 12/4/97 for [27-1] motion for reconsideration, set for 3:30 12/4/97 for [27-2] motion to vacate order [12-4] order, entered; Parties notified. (Signed by Judge Lynn N. Hughes)

11/7/97 31 Notice of Non-Attendance for Pre-trial Conference by Veronica L. Davis, filed (ps) [Entry date 11/10]

11/10/97 33 Minute entry; HEARING held on 11/10/97. Apps.: No appearance for Davis; Mark Walters f/defts. Order to be entered. Motion to recused and Davis' absence discussed. terminated deadlines Ct. Reporter: G Dye (ps) [Entry date 11/14/97]

11/13/97 32 ORDER Davis's motion to recuse is denied, entered; Parties notified. (Signed by Judge Lynn N. Hughes) (hl)

11/18/97 34 TRANSCRIPT OF PROCEEDINGS for dates of Oct. 17,1997 at 11 am before Judge Lynn Hughes filed. (Ct.Reporter: J. Simon) (ps)

11/25/97 35 RESPONSE BY Syntex Laboratories to pltf's [27-1] motion for reconsideration, filed. (Lt)

12/4/97 – **Reset document number to 35 (ps)

12/4/97 36 Minute entry; Hrg. Held; Apps: Walters. Argument heard on Davis's motion fr0[sic] reconsideration #27; Syntex's motion to dismiss #28; Davis motion to Disqualify judge. Order to be entered. Ruling orally rendered on Veronica Davis did not apear. 2) Syntex may submit a bill of costs promptly. terminated deadlines Ct. Reporter: Traylor (hl) [Entry date 12/05/97]

12/5/97	37	ORDER OF DISMISSAL granting Syntex's [28-1] motion to dismiss, enered; Parties notified. (Signed by Judge Lynn N. Hughes) (hl) [Entry date 12/08/97]
12/5/97	--	case closed (hl) [Entry date 12/08/97] [Edit date 01/13/98]
12/12/97	38	MOTION for taxation of Ct. Costs by Syntex Laboratories, Roche Biomedical, Motion Docket Date 1/1/98 [38-1] motion, filed (hl) [Entry date 12/08/97]
12/16/97	39	USCA ORDER denying [0-0] case the petition for writ of mandamus , filed (kh)
12/30/97	40	REQUEST by Veronica L. Davis for transcript of proceedings, filed (lb)
12/30/97	41	Contest by Veronica L. Davis of defendant's [38-1] motion for taxation of Ct. Costs, filed (lb)
12/30/97	42	Transcript request Rehearing Mtn for Dismissal on 12/4/97 before Judge Hughes by Ct. Reporter: Ann Traylor, filed (hl) [Entry date 01/05/98]
12/30/97	43	NOTICE OF APPEAL of 37-1 order by Veronica L. Davis, filed. Fee Status: PAID Receipt #: 474027 (kh) [Entry date 01/16/98]
1/6/98	--	Notice of appeal and certified copy of docket transmitted to USCA: [43-1] appeal (kh)
1/7/98	44	RESPONSE by Syntex Laboratories, Roche Biomedical to [38-1] motion for taxation fo Ct. Costs, filed (hl)

1/14/98	45	ORDER granting [38-1] motion for taxation of Ct. Costs, Veronica L. Davis will pay $6029.35 to Syntex (U.S.A.) Inc. for its discovery costs. Entered; Parties notified (signed by Judge Lynn N. Hughes) (hl) [Entry date 01/15/98]
01/23/98	--	Filing Fee Paid $150.00 RECEIPT # 474800 (bj) [Entry date of 01/29/98]
01/27/98	46	TRANSCRIPT OF PROCEEDINGS of pretrial conference for dates of 11/10/97 before Judge Lynn N. Hughes, filed. (Court Rptr; Gayle L. Dye)
2/2/98	47	TRANSCRIPT OF PROCEEDINGS of Hrg. For dates of 12/4/97 before Judge Hughes., filed. (Court Rptr: A. Traylor) Loose in file (hl) [Entry date 02/03/98]
2/3/98	--	NOTICE of Docketing NOA from USCA Re: [43-1] appeal USCA NUMBER: 98-20046 (kh) [Entry date 02/04/98
3/5/98	--	Certificate of Readiness issued to 5th Circuit Court of Appeals. USCA Number 98-20046. Parties ntfd. (kh)

Supreme Court, U.S.
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No. 98-1313

In The

Supreme Court of the United States

October Term, 1998

VERONICA L. DAVIS,

Petitioner,

vs.

SYNTEX LABORATORIES, INC.;
ROCHE BIOMEDICAL LABORATORIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the District Court err in dismissing Petitioner's claims with prejudice for repeated and willful refusals to comply with its orders, after giving Petitioner multiple opportunities to comply and repeatedly warning Petitioner that a failure to comply would result in dismissal?

2. Did the Fifth Circuit err by not requiring the recusal of the District Court or by affirming the District Court's taxation of costs against Petitioner?

PARTIES TO THE PROCEEDING

Petitioner's statement regarding the parties to the proceeding needs to be corrected in one respect. Petitioner originally sued Syntex Laboratories, Inc. and "Roche BioSciences, Inc." alleging that Roche BioSciences was the owner or a subsidiary of Syntex Laboratories, Inc. The caption in Petitioner's original complaint, however, listed the defendants as Syntex Laboratories, Inc. and "Roche BioMedical." The original complaint was never served. Petitioner filed an amended complaint with Syntex Laboratories, Inc. and Roche BioSciences, Inc. listed in the caption. The correct respondent in this case is Syntex (U.S.A.), Inc., the successor to Syntex Laboratories, Inc. There is, however, no issue in this proceeding concerning whether Petitioner sued the correct defendant or defendants.

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BRIEF IN OPPOSITION

The Respondent, Syntex (U.S.A.), Inc., sued as Syntex Laboratories, Inc., and Roche BioSciences, Inc. (hereafter "Respondent"), respectively requests that this Court deny the petition for writ of certiorari in this case. The opinion of the Fifth Circuit affirming the dismissal of Petitioner's claims is unpublished, but is attached as Appendix 2 to the Petition.

STATEMENT OF JURISDICTION

Petitioner's statement of jurisdiction needs to be clarified, or at least modified, in several respects.

Petitioner's claims were dismissed by the District Court for the repeated and willful failure to comply with the District Court's Orders. The District Court also taxed costs against Petitioner. Petitioner argued on appeal in the Fifth Circuit that both the Order dismissing her claims with prejudice and the Order taxing costs against her were abuses of discretion. At no time, however, did she raise any claim that the District Court's actions amounted to violations of her rights under the First, Seventh, or Fourteenth Amendments to the United States Constitution. Although the District Court did not specify the basis for its order of dismissal, the dismissal was authorized by Federal Rule of Civil Procedure 37(b)(2)(C) and 41(b) as well as the District Court's inherent powers. Nothing in the record implicates any constitutional provisions or the Enabling Act for the Federal Rules of Civil Procedure, 28 U.S.C. § 2072.

STATEMENT OF THE CASE

The District Court dismissed Petitioner's claims because of her repeated, intentional failures to comply with its Orders, and the Fifth Circuit affirmed on that same basis. Pet.'s App. at 3-4.[1] There can be no doubt, however, that Petitioner was well aware of the District Court's authority to control the timing and sequence of discovery and to manage its docket and of the penalties for repeatedly and willfully violating the District Court's Orders. Petitioner is a licensed attorney, and was plaintiff-appellant's counsel in *Woodson v. Surgitek, Inc.*, 57 F.3d 1406 (5th Cir. 1995), in which the Fifth Circuit affirmed the district court's dismissal of the plaintiff-appellant's claims based on Petitioner's similar refusals to follow the district court's orders. (*See* Pet.'s App. 2 at 3-4).

This is a pharmaceutical products liability case. Petitioner alleges that she took the prescription drug Synarel from November 1993 until March 1994,[2] and that nine months later, she experienced a fainting spell at work and was subsequently diagnosed (about one month later) with a pituitary macroadenoma. At the first status conference on June 9, 1997, the District Court ordered Petitioner to produce her medical records and produce an expert

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[1] The petition for writ of certiorari in this case is referred to as "Pet. at ___." References to documents attached to the appendix to the Petition, including the Fifth Circuit's unpublished opinion, which is attached as Appendix 2 to the Petition, are referred to as "Pet.'s App. at ___."

[2] During the relevant time period, Synarel was manufactured by Syntex (U.S.A.), Inc., hereafter referred to as "Respondent." Syntex (U.S.A.), Inc. has appeared in this case.

report by June 30, 1997. (Pet.'s App. at 6). Petitioner did not initially challenge either aspect of this Order. Instead, she agreed to execute a medical records release and requested an extension until September 5, 1997, the Friday before the next status conference, to provide an expert report – representing to the District Court that she had retained an expert. (App. at 2-3).[3]

Petitioner did not produce any medical records, execute a release, or produce an expert report. Instead, she recanted her previous representations, stating that she had not been able to retain an expert and arguing that she should either not be required to produce an expert report or be given more time to retain an expert. (App. at 6). The District Court rejected these arguments, and ordered Petitioner to comply, but Petitioner refused.

Instead, Petitioner produced a handful of medical records and filed motions seeking to set aside the District Court's order, to compel production of documents from Respondent, and for a protective order concerning her medical records. (Docs. 13-15, 21-23).[4] A hearing was held

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[3] Citations to the appendix to this Opposition are referred to as "App. at ___."

[4] The appeal in the court below was handled under an experimental procedure whereby the record was not sequentially numbered and provided to all counsel. Instead, counsel were instructed to cite to the District Court record utilizing the District Court's docket entry numbers. Therefore, citations to the District Court record in this opposition follow this same practice. A copy of the District Court's docket sheet is attached as pages 11-19 to the appendix to the Petition. Some citations to the District Court's record that are also included as part of the appendix to this Opposition are referred to as "App. at ___ (Doc. ___)."

on Petitioner's motions. The District Court denied them all, again ordered Petitioner to comply with its orders, and explained in some detail both the substance of its Orders and their rationale. (App. at 11-31 (Doc. 35)). Again, however, Petitioner failed to comply. (App. at 34 (Doc. 26)). She also threatened legal action against the records service retained by Respondent's counsel to obtain her medical records (App. at 35-36 (Doc. 28, Ex. A)) and refused to accept service of Respondent's document subpoenas. (App. at 37 (Doc. 35, Ex. B)).

Subsequently, Petitioner failed to attend a scheduled status conference, despite proper notice, and thereafter failed to attend a hearing set at her request concerning a motion she filed seeking relief from the previous orders of the District Court. (App. at 38-51 (Docs. 31, 46-47)). Given Petitioner's repeated and intentional refusals to follow the District Court's Orders and her affirmative efforts to subvert them, the District Court dismissed her claims and taxed costs against her. The Fifth Circuit summarily affirmed without oral argument and without published opinion.

REASONS THE PETITION SHOULD BE DENIED

I. There is No Reason to Grant the Petition.

There are no "special" or "important" reasons why a writ of certiorari should be granted in this case, and the Court should decline review. *See* Sup. Ct. R. 10. Contrary to Petitioner's assertions, this case does not involve a denial of due process or any other constitutional or statutory violations. Rather, this case is a straightforward

example of the fundamental principal that district courts, not litigants, have the right to control the timing and sequence of discovery. In this case, the record demonstrates that Petitioner willfully failed to comply with the District Court's Orders despite notice, multiple opportunities, and patient explanations from the District Court as to both the meaning and rationale of its Orders. No important issue exists in this case for the Court to decide – the law granting the District Court the authority to control the timing and sequence of discovery and to maintain its docket was correctly applied to the facts of this case by the Fifth Circuit. This Court's review is not warranted.

II. The Fifth Circuit Correctly Applied the Law to the Facts of this Case in Affirming the District Court's Dismissal of Petitioner's Claims.

A. The District Court Properly Dismissed Petitioner's Claims for Repeated and Intentional Failures to Comply with its Orders.

Fed. R. Civ. P. 37(b)(2)(C) & 41(b), as well as district courts' inherent powers, support dismissal for refusal to obey court orders. While this is obviously a severe sanction,

> [t]he most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976) (per curiam). Petitioner, if anyone, should be aware of the District Court's authority, because, in *Woodson*, the Fifth Circuit affirmed the district court's dismissal of the plaintiff's claims based on Petitioner's similar failures to follow the district court's orders.

In *Woodson*, Petitioner (1) failed to timely designate experts or produce expert reports, arguing that the plaintiff did not have to produce reports that did not exist;[5] (2) failed to produce her client for a court ordered deposition;[6] (3) refused, following settlement, to comply with two court orders to secure a final release of all claims, instead moving to enforce her version of the settlement agreement and for sanctions against the defendants; and (4) failed to appear for a subsequent hearing based on the pendency of a petition for en banc rehearing of a mandamus petition she had filed in the Fifth Circuit seeking recusal of the district judge (which the Fifth Circuit had denied). "Under the circumstances, the district court viewed [Petitioner's] failure to appear as 'yet another obstruction to the progress of this plagued and hostile litigation' "[7] and dismissed the plaintiff's claims with

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[5] 57 F.3d at 1408-09. This argument, which was rejected by the *Woodson* court, is essentially the same as her argument in this case that the District Court could not order her to produce an expert report because it lacked the power to order her to engage in discovery. *See* Pet. at 10, 12.

[6] *Id.* at 1410.

[7] *Id.* at 1415.

prejudice. Petitioner moved for reconsideration, contending that the district court lacked authority to enter the dismissal because of the pending request for en banc rehearing and that the district court had ordered counsel to refrain from filing further pleadings (an order she had ignored). Additionally, as in this case, Petitioner claimed that the district court was biased and demanded recusal. *Id.* at 1415.

On appeal, the Fifth Circuit affirmed the dismissal under the district court's inherent powers based on Petitioner's conduct, including (1) her continued requests for enforcement of her version of the settlement agreement despite the parties' contrary agreement; (2) her representation to the district court that no expert was willing to perform certain medical tests on the plaintiff, despite contrary evidence in the record; (3) her filing of a meritless mandamus petition apparently for purposes of delay; and (4) her failure to appear at scheduled hearings. *Id.* at 1417-18. The court rejected Petitioner's argument that the pendency of a mandamus petition seeking recusal deprived the district court of jurisdiction and justified Petitioner's non-attendance at the hearing. *Id.* at 1416.

1. Petitioner intentionally and willfully failed to follow the District Court's Orders.

Petitioner repeatedly and intentionally failed to follow the District Court's Orders, despite multiple opportunities and multiple warnings that her failure would result in dismissal. The District Court initially ordered Petitioner to (1) "produce all her medical records" and (2) "provide reports from the doctors that can explain the

causal link between the drug and her condition by June 30, 1997." (Pet.'s App. at 6). This Order did not specify the type of expert Petitioner was to obtain or the form the report was to take.

Petitioner did not challenge the District Court's Order, but she did not comply either. She did not produce any medical records between the June 9 conference and the next status conference on September 8, 1997,[8] nor did she provide a release by September 8, even though Respondent's counsel twice sent her releases and requested execution. (Doc. 17, Ex. B; Doc. 35, Ex. D; Doc. 34, pp. 20-21). Petitioner also did not file an expert report by June 30. Instead, she requested an extension until September 5 (the Friday before the next status conference), representing that she had an expert, but that she needed to obtain and provide him with additional documents, including her medical records. (App. at 2-3 (Doc. 9, pp. 1-2)).

On or about July 31, 1997, Petitioner served interrogatories and requests for production, seeking virtually every document in existence concerning Synarel. (Doc. 17, Exs. F & G). Respondent properly objected, but also offered to produce literally thousands of pages of documents from the New Drug Application for Synarel ("NDA"), including documents concerning composition,

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[8] Prior to the June 9 conference, Appellant produced eight pages of medical records: three MRI reports and a five page narrative from a treating physician dated March 3, 1995 stating that Petitioner's fainting at work in January 1995 was not related to her use of Synarel. (Doc. 18, p. 2).

testing, and FDA approval, documents concerning labeling, advertising, and manufacturing, and correspondence with the FDA. (Doc. 17, Exs. I & J). Petitioner never made any attempt to examine these documents.

On September 5, the date Petitioner had specifically requested as the deadline to file her expert report, she instead filed a "Response to the Court's Order to Produce Reports from Doctors," (App. at 5-6 (Doc. 11)), in which she asserted, for the first time, that she should not be required to produce an expert report at all, or, alternatively and contrary to the representations in her motion for extension, that she had not retained an expert and needed additional time to do so. (App. at 6 (Doc. 11, p. 2)).[9] It was only after Petitioner recanted her previous representation that she had an expert and would file a

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[9] Although Petitioner claimed below that she attempted to retain experts, she never submitted anything to the District Court or the Fifth Circuit, either with her September 5 filing or subsequently, to support this assertion. Additionally, the reason proffered for her failure to retain an expert – that all the people she contacted had either worked for Syntex (U.S.A.), Inc. or done research for it (App. at 6 (Doc. 11, p. 2)) – is not only preposterous but also wholly unsupported by the record below. Moreover, even assuming, without any record support, that this is true, Petitioner can point to no rule that would prohibit a former employee or researcher from acting as her expert. Instead, Petitioner makes the bizarre and wholly unsupported claim that there exists a "mandate that researchers for Respondents enter into an agreement in which information about the product Synarel, which is the object of this suit, could not be used in preparing an expert report for any person or party other than Respondents. . . . " There is not a jot of support in the record for this claim, and moreover, it was not raised below in either the District Court or the Fifth Circuit.

report that the District Court, in an attempt to focus Petitioner's attention, ordered Petitioner to "deliver all her medical records to Syntex by noon, Wednesday, 9-17 or her case will be dismissed. . . . " and also ordered her to file an expert report from an endocrinologist concerning causation by October 31, 1997. (Pet.'s App. at 7). There is no merit to Petitioner's repeated complaints that the District Court improperly designated the type of expert she was to retain. Had Petitioner complied with the District Court's original Order as she represented she would, it would never have been an issue.

Following the September 8 conference, at Petitioner's request, Respondent voluntarily provided her with a list of medical records that it had obtained and a list of records it had not obtained. (Doc. 28, Ex. E). On September 17, Petitioner faxed 36 pages of records to Respondent's counsel.[10] (Doc. 18, Ex. A). Instead of producing her other records, she filed a motion for protective order, based on her unsupported assertion that all pre-1993 medical records were irrelevant. (Doc. 15). Astonishingly, Petitioner filed this motion even though she sought medical treatment for symptoms for which she seeks recovery in this case years before she ever took Synarel.[11]

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[10] In correspondence accompanying her September 17 fax, Petitioner claimed that the records were from five health care providers. (Doc. 18, Ex. A). It is impossible, however, to tell from the records faxed whether this is true.

[11] Petitioner claims to suffer, among other things, excess weight gain, body aches and pains, and extreme fatigue as a result of her use of Synarel. (Pet. at 4; Doc. 3, p. 3). In February 1992, Petitioner was seen at a hospital emergency room for chest pain, vomiting, neck pain, leg pain and shoulder pain. Her

Also, despite Petitioner's failure to attempt to examine the thousands of pages of documents Respondent had offered to produce in response to her interrogatories and requests for production, Petitioner filed a motion to compel/motion for sanctions against Respondent, contending that Respondent should have produced voluminous documents, including the entire NDA for Synarel, not only in response to her discovery requests, but as part of Respondent's initial disclosures (without even a formal discovery request) and should be sanctioned for failing to do so. Petitioner also argued, without apparent irony, that Respondent should have designated all its experts and provided expert reports with its initial disclosures. (Doc. 13, pp. 1-2). Petitioner also filed a motion for hearing on the Court's previous Order to produce her medical records, contending that she should be excused from compliance because she had agreed to provide a release, (Doc 14, pp. 1-2), even though she had admittedly failed to timely provide one.

A hearing on Petitioner's motions was set for Friday, October 17, 1997. (Doc. 20). At the hearing, Petitioner served on counsel for Respondent an amended motion for protective order and an amended motion for hearing on the Court's previous Order, essentially reasserting the

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history included a previous accident and a hiatal hernia. Similarly, records dating back to 1986 refer to Petitioner's weight gain and regular use of prescription diet pills and to a 1979 diagnosis of anemia and resulting complaints of fatigue. (Doc. 18, pp. 4-6 & Exs. 3-5). In spite of this evidence, Petitioner continued to assert throughout the proceedings below that all pre-1993 medical records were irrelevant, without ever submitting anything to support her contentions.

same arguments set forth in her original motions. (Docs. 21, 23). Petitioner also served a motion to quash depositions by written questions (App. at 8-9 (Doc. 22)) contending, again with no apparent irony, that Respondent was seeking the production of medical records without a valid medical authorization – notwithstanding that the basis of her motion for relief from the District Court's order to produce medical records was her supposed willingness to provide a release. (Doc. 22, p. 2).

At the hearing, Petitioner reluctantly conceded that she had not complied with the District Court's Orders, even though she knew that the filing of her motions did not toll her obligations. (App. at 11-19 (Doc. 34, pp. 1-10)). She argued, however, that she should be excused from producing any medical records because Respondent was seeking records dating back to her birth. Besides being inaccurate, this argument ignored her failure to timely provide a release and her incomplete production of medical records concerning the conditions alleged in her complaint.

Petitioner also argued that, based on the default provisions of Fed. R. Civ. P. 26, she did not have to produce an expert report until 90 days before trial or, alternatively, that she did not have to produce one until Respondent had produced all the documents she demanded. (App. at 19, 21-22 (Doc. 34, pp. 14, 18)). In rejecting these arguments, the District Court explained, at length, the substance of its Orders and their rationale.

> The reason for case-specific discovery orders is that cases vary a great deal in the

factual context, and there is, as this case illustrates, considerable asymmetry in sources of information.

In a case like this, the plaintiff has unique knowledge that connects her injury to the defendant. This is not a case where the defendant knows how it was driving or how it maintained its truck right before the collision.

The defendant in this case is obliged to make considerable regulatory disclosures, does in fact commercially disclose medical data about the drug, and most of all, has the requirement in this state that there be a licensed medical expert between the sale of the drug and the consumption by the patient.

Under the circumstances of this type case, the discovery is – the information that needs to be discovered is the plaintiff's information.

I have had these kinds of cases where it turned out, when you looked at the medical records, the plaintiff actually didn't take the drug as alleged.

The only way to find out whether there is a connection between the plaintiff's claim of this drug's ill effects is to know the nature of the plaintiff's physical condition, the diagnosis, what was prescribed and when; including the defendant's drug, plus other drugs, because there are positive and negative synergies, although I don't think "synergy" technically should be used in a negative sense.

There are good and bad combinations for drugs, and there are good and bad combinations of symptoms. And most important, every biochemical adjustment of a person has secondary

> consequences that are less than favorable. No medical or chemical intervention does not have side effects. Therefore it is essential in this kind of case, that the defendants know the benefit sought, the benefit achieved, as well as the alleged secondary unfavorable consequences.
>
> The Court has not totally prohibited discovery from the defendant. The Court has made the discovery from the defendant depend upon a proper production by the plaintiff of a connection between her complaint and the defendant's product.[12]

Moreover, the District Court told Petitioner that she could comply with its Order to produce an expert report by submitting a report or affidavit from an expert explaining that he could not render an opinion without first obtaining specific documents from Respondent. The District Court, however, cautioned Petitioner that she could not avoid its Order based solely on her unsupported demands for voluminous document production.

> We have discussed on a couple of occasions that Syntex has a responsibility to respond to a very specific, scientifically based complaint; they do not have the responsibility to disgorge all of their files just because you have made an unsubstantiated complaint against them.
>
> If you can articulate some specific need for some documents that they may have, then I will make them produce them, if I believe the need is genuine. Certainly if one of your science consultants articulates the need for some additional data besides your condition and the history of

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[12] App. at 25-27 (Doc. 34, pp. 25-27).

> what you took when, then I will consider making them respond to it promptly.
>
> But for you to demand wholesale, so far, apparently wholly irrelevant documents from them, while cloaking your medical history, suggests a malicious attempt to have Syntex pay you the value of the transaction cost you're imposing by making the claims in the first place. And that is not why we have lawsuits, so that you can extort a settlement value from them by attrition.[13]
>
> If Syntex has done something wrong, it should compensate you. It is your responsibility as the plaintiff to prove that they did something wrong.
>
> At the moment, we have no evidence that the injury you claim to have suffered is connected with Syntex's product, and that is an essential element of your claim and we are not doing anything else until we know that Syntex has a factual connection to this case.[14]

Additionally, the District Court again cautioned Petitioner, as it had done before, that the failure to comply with its Order would result in dismissal. (App. at 20, 30 (Doc. 34, p. 14, 30). At the conclusion of the hearing, the

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[13] Petitioner cites this reference to "extortion" out of context, in an attempt to suggest bias on the part of the District Court. The record as a whole demonstrates, however, that the District Court patiently allowed Petitioner multiple opportunities to comply with its orders, even in the face of Petitioner's blatant refusals to do so.

[14] App. at 20-21 (Doc. 34, pp. 15-16).

District Court ordered that Petitioner's October 31 deadline for the production of an expert report remained in force. (App. at 28 (Doc. 34, p. 28)). The Court further ordered, at Petitioner's suggestion, that she provide counsel for Respondent a list of her medical providers so that he could obtain the records, with Petitioner to pay the costs of obtaining these records. (App. at 29 (Doc. 34, pp. 29-30)). Petitioner then made an oral motion to recuse, which was denied. (App. at 30-31 (Doc. 34, pp. 30-31)).

Although Petitioner understood the District Court's Orders (App. at 27, 29-30 (Doc. 34, pp. 27, 29-30)), she still did not comply. Instead, on October 21, 1997, she filed a pleading stating that she would not file an expert report or pay for Respondent's cost of obtaining her medical records. (App. at 34 (Doc. 26, p. 2)). Petitioner also threatened the records service hired by Respondent with "**immediate legal action**"[15] if any additional records were obtained or released to Respondent's counsel (App. at 35-36 (Doc. 28, Ex. A)), and refused to accept service of Respondent's notices of these records depositions. (App. 37 (Doc. 35, Ex. B)).[16]

On November 5, 1997, Petitioner filed a written motion to recuse (Doc. 29), which was set for hearing on December 4, 1997 (Doc. 30), along with her motion to reconsider or vacate the Court's Orders of October 17,

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[15] Emphasis in original.

[16] Thus, Petitioner's conduct belies her argument that the District Court erred in ordering her to produce her own medical records because the parties had agreed that Petitioner would provide a release and Respondent would obtain the records.

1997 (Doc. 27), and Respondent's motion to dismiss. (Doc. 28). Another pretrial conference was already set for Monday, November 10, 1997 (Doc. 24; Doc. 34, p. 30). On Friday November 7, 1997, Petitioner filed a "Notice of Nonattendance for Pretrial Conference," in which she stated that "Plaintiff finds that a pre-trial conference would serve no legitimate end." (App. at 38 (Doc. 31, p. 1)). This document was not served on counsel for Respondent until the day of the hearing and was never served on the District Court by Petitioner (a copy was provided by Respondent's counsel and made a part of the record by the District Court). Petitioner did not attend the hearing. (App. at 41-44 (Doc. 46)).

On November 13, 1997, the District Court entered a written Order denying Petitioner's motion to recuse. (Doc. 32). On or about December 4, 1997, Petitioner filed a petition for writ of mandamus with the Fifth Circuit. Petitioner did not, however, attend the previously set December 4 hearing, even though it had been set at her request. (App. at 47 (Doc. 47)). The Court contacted her at home, and she contended that she did not have to appear because her petition for writ of mandamus was pending. (App. at 46 (Doc. 47, p. 2)). The Fifth Circuit had, however, in *Woodson*, already rejected this argument, holding that the filing of a mandamus petition does not stay proceedings in the district court. *Woodson*, 57 F.3d at 1418.

Thus, there is no support for Petitioner's contention that she was unable to comply with the District Court's Orders, despite a good faith effort to do so, or that the District Court denied her the opportunity to conduct discovery. Indeed, the record demonstrates that Petitioner's claims were dismissed not because she failed to

comply with every minute detail of the District Court's Orders, but because she failed to comply in any respect with any of its Orders, or to even attempt to comply. Instead, she affirmatively refused to comply, and even took steps to frustrate the carrying out of the District Court's Orders.

2. No lesser sanction would have been effective.

The District Court tried both the carrot – multiple extensions and lengthy explanations of its Orders and their basis – and the stick – threats of dismissal – to obtain compliance with its Orders. Neither worked. In the end, the District Court correctly concluded that, despite its efforts, "there is obviously nothing I can do to persuade Ms. Davis to follow the rules or my orders, or otherwise responsibly to pursue this claim." (App. at 46 (Doc. 42, p. 2)).

> Well, you know, before you impose the death penalty, as people say, you should work hard to assure yourself that no lesser penalty would suffice.
>
> In this case on a couple of occasions, the complications of this kind of claim had been discussed with Ms. Davis, and what was required to connect Syntex's substance to her condition was discussed.
>
> At those occasions, the entries in her medical records which appeared to disclaim the very connection that she was asserting were discussed, all in an effort to focus both counsel on

what truly needs to be done in the case rather than traditional standard discovery.

She has repeatedly refused to produce the information peculiarly within her knowledge, has categorically refused to obey orders to furnish records and identify people, and has not, of course, produced an expert's report or identified any expert who makes the connection [sic] of her identification of her medical service providers, as we discussed with her once before, is wholly inadequate.

She is sometimes sick but she's not too sick to produce notices of nonappearance, repetitive motions to recuse, all based on my inability to read the rules of civil procedure, including this inch and a quarter stack of stuff and her refusal to attend hearings.

Frequently, in these kinds of cases, the Court is put in the dilemma of ascertaining whether we're dealing with client recalcitrants [sic] or counsel's recalcitrants [sic]. Here that dilemma is solved because patient and doctor are the same, and it is clear to me that Ms. Davis has a peculiar view of her responsibilities as a client, and independently, as counsel. She has failed in both of those duties after, what I believed to have been, polite, patient reexplanations of her responsibilities.

The only response that Syntex or the Court has received from the attempt to manage this litigation so we could dispute and resolve the problems that actually occurred has been unilateral assertions that she's not going to comply, not going to attend, not going to pay for, not going to produce, and perhaps the most egregious, is to threaten suit against what

> amounts to a clerical service retained by your firm.
>
> Noncooperation comes naturally to some folks with not much effort. In those instances she actively asserted, as a lawyer and client, a cause of action against people who didn't, people who are not responsible for the actions that they were about to take, and who in any event had not done anything wrong if they had done everything they had been asked to do.
>
> That's one step, one small step about [sic] willful destruction of evidence. It increases the costs, of course, and reduces the likelihood that Syntex will see the evidence that will make it clear one way or the other that it might be responsible for her illness.

(App. at 47-49 (Doc. 42, pp. 4-6)). Thus, in this case, the District Court considered (and tried) other alternatives, but concluded they would not work, and there is thus no basis for Petitioner's argument that the District Court should have granted her additional time in the face of Petitioner's affirmative refusals to comply with the District Court's Orders.

This Court has affirmed dismissals under similar circumstances. *E.g., National Hockey League*, 427 U.S. at 643 (dismissal for repeated failure to answer interrogatories despite multiple opportunities and admonitions); *Link v. Wabash R.R.*, 370 U.S. 626 (1972) (affirming dismissal for failure to attend pre-trial conference given prior history of delay). As this Court noted in *National Hockey League*, "[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District

Court abused its discretion in so doing." 427 U.S. at 642. In this case, the record demonstrates, as the Fifth Circuit found, that Petitioner "willfully abused the judicial process" and that the District Court "acted well within its discretion and showed considerable restraint in handling this matter." Pet.'s App. 2 at 4.

B. The District Court Did Not Err in Requiring Petitioner to Designate One or More Experts on Causation and Provide Reports.

Petitioner's various arguments concerning the timing of the production of her expert report are all without merit. Fed. R. Civ. P. 26(a)(2)(C) provides that the identification of experts and the provision of their reports, "shall be made at the times and in the sequence directed by the Court," and Fed. R. Civ. P. 16(b) authorizes the district courts to issue scheduling orders, including deadlines for the designation of experts and the provision of reports. Petitioner's reliance on the default provisions of Rule 26 and the parties' joint case management plan are thus misplaced.

Petitioner's argument that she could have established causation without expert testimony is equally flawed. (Pet. at 12). All Petitioner's claims are based on her allegation that she was injured as a result of receiving Synarel. (Doc. 3). To prevail on any of these claims under Texas law, she must establish causation. *E.g., Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 481 (Tex. 1995); *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995). Whether Petitioner's alleged injuries were caused by Synarel is outside the common experience of lay jurors

and must be established through competent expert testimony.[17] *E.g., Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995); *Orkin Exterminating Co. v. Davis*, 620 S.W.2d 734, 736-37 (Tex. Civ. App. – Dallas 1981, writ ref'd n.r.e.); *Tyler Mirror & Glass Co. v. Simpkins*, 407 S.W.2d 807, 813-14 (Tex. Civ. App. – Tyler 1966, writ ref'd n.r.e.). Thus, if Petitioner failed to timely designate experts or offer expert testimony at trial, Respondent would be entitled to judgment, because there would be a complete failure of proof as to causation.[18]

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[17] Petitioner cites the wholly inapposite case of *Indentiseal Corp. v. Positive Identification Sys., Inc.*, 560 F.2d 298 (7th Cir. 1977) for the proposition that Federal Rules of Civil Procedure "do not give district judges the authority to compel a litigant to engage in discovery . . . " *Id.* at 301. In *Indentiseal*, the plaintiffs' counsel made a strategic decision not to engage in discovery prior to trial. The trial court dismissed the case for want of prosecution on the grounds "that the pretrial work necessary to efficiently try [the] action had not been done." *Id.* The Seventh Circuit reversed, essentially on the grounds that litigation strategy decisions are left to counsel, not the district courts. *Id.* at 302.

Indentiseal, a commercial case, has nothing to do with this case. Petitioner cannot establish causation without expert testimony. She certainly cannot, as she apparently believes, simply introduce Respondent's documents (which she failed to examine) without expert testimony to explain how these supposed documents establish causation. If Petitioner made a strategic decision to proceed without experts, then Respondent was entitled to judgment.

[18] There is no support for Petitioner's argument that she "had sufficient information to substantiate her claims that . . . Synarel . . . caused or contributed to the medical problems of which she complained." Pet. at 3. Nothing in the documents submitted below by Petitioner or anything else in the record states that there is a causal relationship between Synarel and

1. The District Court did not err in refusing to defer the production of Petitioner's expert report until Respondent had complied with her onerous discovery demands.

Petitioner argues at great length, as she did below, that the District Court erred in not requiring Respondent to comply with her voluminous discovery requests and in not excusing her from providing an expert report until the documents were produced. Petitioner's contentions, however, are belied by her failure to examine the thousands of pages of documents Respondent offered to produce and her failure to heed the District Court's instruction to submit a statement from her expert concerning the specific additional documents the expert needed to formulate his or her opinions. (App. at 20 (Doc. 34, p. 15)). Moreover, it was only after Petitioner failed to honor her pledge to produce an expert report by September 8 that she began demanding to be excused from compliance until Respondent met her discovery demands. Indeed, in her June 25 motion for extension, Petitioner stated that she needed additional time to obtain several items, including her own medical records and documents from the FDA, to provide to her expert. (App. at 2-3 (Doc. 9)). Not only did she fail to produce any medical records obtained by September 8, but she indicated in her September 5 filing that she did not, in fact, have an expert. (App. at 5-7 (Doc. 11)).

Petitioner's arguments have nothing to do with due process, equal protection, access to the courts, or any

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any of the injuries alleged by Petitioner or even that such a relationship is likely or possible.

other aspect of the Fourteenth Amendment or with the First or Seventh Amendments. They have everything to do, however, with the district courts' right to control the timing and sequence of discovery and to manage their dockets. Accepting Petitioner's arguments in this case would not only impose a dramatic double standard of discovery – Petitioner is entitled to all documents having anything at all to do with Synarel, without limitation, while Petitioner only has to produce those medical records that she herself deems relevant – it would amount to the acceptance of the proposition that litigants, and not district courts, have the ultimate authority to dictate the timing, sequence, and manner of discovery.

III. The District Court Did Not Err in Awarding Costs to Respondent.

Petitioner's only challenge to the District Court's award of costs is that it includes costs for obtaining her medical records. These costs are allowable costs under 28 U.S.C. § 1920. *E.g., Finchum v. Ford Motor Co.*, 57 F.3d 526, 534 (7th Cir. 1995); *Garmong v. Montgomery County*, 668 F. Supp. 1000, 1011 (S.D. Tex. 1987). Moreover, the District Court properly ordered payment of these costs at the October 17 hearing based on Petitioner's repeated failure to produce medical records as ordered. (App. at 29 (Doc. 34)).

IV. The Fifth Circuit Did Not Erroneously Fail to Require Recusal.

Petitioner also seeks an order requiring the District Court's recusal for alleged bias. (Pet. at 15-17). As grounds for recusal, Petitioner cites the District Court's rulings complained of in her petition and a reference to "extortion" taken completely out of context. *See supra* n. 12 and accompanying text. She also complains that she was "prohibited often from responding, explaining or addressing issues of concern to the court." Pet. at 16. Nothing could be further from the truth. Petitioner was allowed to file multiple, repetitive motions, repeatedly arguing the same points that had already been rejected by the District Court. Likewise, she was allowed great lee-way at the October 17, 1997 hearing to attempt to argue her position and explain her points. Petitioner then failed to attend the November 4, 1997 status conference and subsequently failed to attend a hearing that had been set at her request on motions seeking relief from prior Orders of the District Court.

Recusal for bias or prejudice is only constitutionally required "in the most extreme of cases . . . ." *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 821 (1986). Moreover, the alleged bias or prejudice must be based on an extra-judicial source and cannot be based merely on court rulings that Petitioner disagrees with or opinions expressed by the District Court formed on the basis of the evidence before it, i.e., Petitioner's conduct. *E.g. Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1301 (D.C.

Cir. 1988). In this case, as in *Woodson*, the record demonstrates exceptional patience and forbearance by the District Court and is devoid of anything that would warrant recusal.

V. The Petitioner Has Not Demonstrated any Compelling Reason to Review this Case.

There is no support for Petitioner's constitutional claims or for her contention that the Fifth Circuit's decision was inconsistent with applicable decisions of this Court or that there is a conflict in the circuits as to "what constitutes discovery abuse which would warrant sanctions." Pet. at 5.[19] This case represents an absolutely

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[19] Petitioner argues that there is a conflict between the Fifth Circuit's decision in this case and its previous decision in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). In *Ryland*, the plaintiffs brought a civil rights action alleging that their daughter was murdered by one defendant and that all defendants, acting under color of state law, concealed the murder and prevented a full investigation. The District Court dismissed on standing grounds, and the Fifth Circuit reversed. This case has absolutely nothing in common with *Ryland*. Among other things, Petitioner's claims were not dismissed for failure to state a claim, nor was it held that she lacked standing. Instead, unlike the plaintiffs in *Ryland*, Petitioner's claims were dismissed because of her own conduct. The other case cited by Petitioner in an attempt to demonstrate a conflict is *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997). If anything, *Swekel* supports Respondent's position. In *Swekel*, the survivor of a pedestrian who died in a traffic accident brought a civil rights claim against the city and its officials, alleging that their cover-up of the identity of the second driver allowed the statute of limitations on her wrongful death action to run, thereby violating her right of access to the courts. The Sixth Circuit, however, held that the

straightforward application of the rule that district courts, and not litigants, have the right to control their dockets and discovery. None of Petitioner's exaggerations or distortions can transform this unremarkable case into one worthy of this Court's review.

CONCLUSION

The decision of the Fifth Circuit comports with the Federal Rules of Civil Procedure and with the decisions of the federal courts. There is nothing "special" or "important" under Rule 10 for this Court to consider. The petition for writ of certiorari should be denied.

Respectfully submitted,

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Syntex (U.S.A.), Inc., Sued as
Syntex Laboratories, Inc. and
Roche BioSciences, Inc.

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survivor's failure to make some attempt to gain access to the courts precluded her recovery on the claim that her right of access was denied. Similarly, in this case, Petitioner's repeated refusals to follow the District Court's Orders, and indeed, her overt attempts to frustrate the District Court's Orders, preclude a claim that she was somehow denied a right of access to the courts.

APPENDIX

LIST NAMING ALL PARENT COMPANIES AND NON-WHOLLY-OWNED SUBSIDIARIES (GREATER THAN 5 PERCENT) OF RESPONDENT SYNTEX (U.S.A.), INC., SUED AS SYNTEX LABORATORIES, INC. AND ROCHE BIOMEDICAL LABORATORIES, INC., AS REQUIRED BY RULE 29.6 OF THIS COURT.

Roche Holdings, Inc.

Roche Finance, Ltd.

Roche Holding, Ltd.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS,	§	
Plaintiff	§	
	§	
VS.	§	**H-97-177**
SYNTEX LABORATORIES, INC. & ROCHE BIOSCIENCES,	§	**(Filed Jun 25, 1997)**
Defendants	§	

PLAINTIFF'S MOTION TO EXTEND TIME TO FILE EXPERT REPORT TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Veronica L. Davis, Plaintiff, in the above entitled and numbered cause and makes this Motion to Extend Time to File its Expert Report and in support thereof would show the following:

1. That on June 09, 1997, a Status Conference was held with opposing counsel and the Honorable Lynn Hughes;

2. That the Court set June 30, 1997 as the date by which Plaintiff should file an expert report showing the causal connection between her injuries and the medication which is the object of this suit;

3. Plaintiff's expert is unable to comply with the date set by the Court, as additional data, information, and previous medical records are being obtained and retrieved which is not in [sic] currently in the hands of the expert;

4. Because the Court apparently seeks a more in depth analysis than the one previously provided, additional

data, records, and medical data and studies must be obtained.

5. Plaintiff believes that this information can be obtained and compiled by the next Status Conference set for September 08, 1997.

6. In light of the Court's request, Plaintiff believes that it will be necessary to obtain other experts in the fields of pharmacology and gynecology, thereby, making additional time to obtain these expert opinions necessary.

7. The parties have conferred regarding the submission of the expert reports. Specifically, Plaintiff spoke with Mark Walters, as Richard Josephson was on vacation on the date of Plaintiff's call, June 24, 1997.

WHEREFORE PREMISES CONSIDERED, Plaintiff seeks an extension of time to file its Expert Report(s).

Respectfully submitted,

/s/ V.L. Davis
Veronica L. Davis
S.B.T. # 05557300
222 N. Mattson
West Columbia, Texas 77486
(409) 345-2953
(409) 345-5461

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Motion for Extension has been sent by U.S. Mail to Baker & Botts, 3000 One Shell Plaza, 910 Louisiana, Houston, Texas 77002 on this the 24th day of June, 1997.

/s/ V.L. Davis
VERONICA L. DAVIS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
HOUSTON DIVISION

VERONICA L. DAVIS, PLAINTIFF	§	
vs.	§	CIVIL ACTION NO. H97-177
SYNTEX LABORATORIES, INC. & ROCHE BIOSCIENCES, DEFENDANTS	§	(Filed Sep. 05, 1997)

PLAINTIFF'S RESPONSE TO THE COURT'S ORDER TO PRODUCE REPORTS FROM DOCTORS

TO THE HONORABLE UNITED STATES DISTRICT COURT:

NOW COMES Veronica L. Davis, hereinafter called Plaintiff, and in response to the Court's directive to provide "reports from the doctors that can explain the causal link between the drug and her condition", Plaintiff produces the following information in lieu thereof:

1.

a. The medical narrative from Tahgi Shafie

b. The notes/consultation report from the medical file of Dr. Edward Murphy

c. Findings submitted to the Food & Drug Administration showing the causal connection between the aforementioned drug and rats.

d. Findings submitted to the Food & Drug Administration regarding seeing if same occurs in children with precocious puberty;

e. Case study information showing the occurrence of pituitary adenoma (not included)

f. The Physicians's Desk Reference (not included)

g. The package insert from Synarel

h. Proposed labeling on package insert for year 1991?; paragraphs 19, 20, 13, 26 and figure below paragraph below 27, 31-36

2. Plaintiff would show that she has exercised due diligence in seeking to obtain an expert, other than her treating physicians, as it relates to the effects of the aforementioned medication. However, each individual contacted thus far, intimately familiar with the medication made the basis of this lawsuit has either worked for Syntex U.S.A. or done research for Syntex U.S.A.

3. Plaintiff needs additional time to secure an expert as it relates to the causal connection between the drug and the symptoms experienced by Plaintiff.

4. Plaintiff would show that by the information provided by Syntex laboratories regarding the causal connection between the drug and the symptoms complained of by Plaintiff, same is not necessary, as Syntex has acknowledged, admitted, or shown evidence that same or adverse effects of the medication.

5. Plaintiff would further show that if Defendants would engage in free discovery and provide the Initial Disclosures as required by law, the causal connection would be evidence to the Court, without necessity for an expert report.

WHEREFORE PREMISES CONSIDERED, Plaintiff submits the foregoing information in lieu of an expert's report and seeks additional time to secure same.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS,	§	
Plaintiff	§	
	§	
VS.	§	**H-97-177**
SYNTEX LABORATORIES, INC. & ROCHE BIOSCIENCES,	§	
	§	
Defendants	§	

MOTION TO QUASH DEPOSITION BY WRITTEN QUESTIONS

(Filed Oct. 17, 1997)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, VERONICA L. DAVIS, Plaintiff, in the above entitled and numbered cause and makes this its Motion to Quash the Deposition on Written Questions and in support thereof would show the following:

Plaintiff received notice of Intention to Take Deposition by Written Question of the following entities on September 29, 1997:

1.

a. Columbia Bellaire Medical Center

b. Hnrey [sic] D. Wilde, Jr.

c. Raymond Martin, M.D.

d. Memorial Hospital Southwest

e. Brazosport Memorial Hospital

f. Angleton-Danbury General Hospital

g. Texas A & M University – A.P. Beutel Health Center

h. Harris County Child Protective Services

i. Liberty Mutual Insurance Group

2. On another date (Date Unknown), Defendant's sought Deposition on Written Questions from the following medical providers:

a. John Burr Miller III

b. Richard Berger

c. Samuel Marynick

d. Maurice L'Ecuye

e. David B. Rosenfeld

3. Plaintiff would show that a motion to quash is necessary in that even though Plaintiff has sought a Protective Order on September 13, 1997, to stop the production of all irrelevant records, relevant to the proceeding at hand, and all records which constitute an unwarranted invasion of privacy, Defendants have continued to seek the production of Plaintiff's medical records.

4. Plaintiff would further show that a hearing on its Motion for Protective [sic] was set for October 17, 1997 with all parties having been noticed of an earlier hearing on or about September 29, 1997, however, in spite of same, Defendants sought the production of the medical records of Plaintiff, without a valid medical authorization to do so.

5. Plaintiff would further show that the seeking of a Protective order should have caused a cessation in the request for such records by the Defendant, however, Defendant has continued in its campaign of harassment, though a hearing has been set on the matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS
plaintiff

v.

SYNTEX LABORATORIES, INC. and ROCHE BIOMEDICAL LABORATORIES, INC.
defendants

97-CV-177
October 17, 1997
Houston, Texas
11 a.m.

BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT COURT
PROCEEDINGS

APPEARANCES:

For the Plaintiff:
Veronica L. Davis, Pro Se
222 N. Mattson
W. Columbia, Texas 77002
409/345-2953

For the Defendants:
Mark Walters
Baker & Botts
910 Louisiana, Suite 3000
Houston, Texas 77002
713/229-1234

Proceedings taken and transcript produced by computer-aided transcription.

[p. 2] THE COURT: Thank you. Be seated.

Ms. Davis, do I understand that you have not yet produced your medical records?

MS. DAVIS: No, Your Honor, that is not correct.

Your Honor, may I approach the bench, please?

THE COURT: Yes, ma'am.

MS. DAVIS: I have brought some motions this morning to file with the clerk. I was told to bring them directly to the courtroom, Your Honor. I have furnished opposing counsel with a copy when I arrived this morning.

I amended one of my motions because I found a mistake in it, and in so amending it, I added two other points. The other motion, I added some points that I did not previously discuss, regarding seeking to void the Court's order as it related to the production of the expert report, the Daubert report, that is due on October 31, 1997.

THE COURT: How can you tell me you have produced all your medical records when at the same time you have a motion to prohibit them from getting them?

MS. DAVIS: Your Honor, the medical records that I am seeking to prohibit deal with medical records that are not relevant to this case.

THE COURT: I get to decide that, Counsel.

MS. DAVIS: Your Honor, may I make my motion and my argument?

[p. 3] THE COURT: No. You're going to do what I want to do. I'm in charge here.

Now, we've been together at least twice, and I told you that it is your responsibility to produce your medical records. Now, the first thing I asked you this morning was, have you produced your medical records, and you said yes. And the answer is that you have not produced your medical records.

MS. DAVIS: No, sir, that is not the answer. I am seeking a motion to –

THE COURT: You have either produced them or you haven't. That's a physical fact, ma'am. That you've filed a motion for protective order, that you have moved to quash them, that you have asserted a privilege does not affect the fact that I told you to do it some time ago.

MS. DAVIS: Your Honor, they have been produced. That doesn't mean that I don't object to the production of the documents.

THE COURT: Does Syntex have your medical records?

MS. DAVIS: Yes, Your Honor, they do.

MR. WALTERS: No, we don't, Your Honor. We have some medical records. After we had the last hearing, Ms. Davis asked me to send her a list of what we did and did not have. I did that. Then we got the motion to compel. I know that we still have many records ordered that are – records orders that [p. 4] are outstanding because of her – I mean, her pending motion to quash. So, I mean, there are things that we have asked for that we don't have.

THE COURT: Before you asked for them, Mr. Walters, I told her to produce them.

MR. WALTERS: Absolutely. No question about it. And we got – all I'm saying is, we don't have some of those things.

THE COURT: When I tell you to do something, Ms. Davis, you must do it.

MS. DAVIS: Your Honor, may I speak, please?

THE COURT: No, You must listen.

Now, I ordered you to produce your medical records; I did not order Mr. Walters to go get them. He has, in the face of your refusal to do as you were ordered, set about fetching them on his own. And that is all right with me, too, because there is a secondary reason he is doing that, and that is, he has no confidence that you will produce them all, no matter what I say.

I'm going to ask you one more time: Have you produced all of your medical records? And I think I said back for ten years, didn't I?

MS. DAVIS: That's the problem, Your Honor. They have gone back to the –

THE COURT: Wait. Wait. I didn't ask you that, I asked Mr. Walters that.

[p. 5] MR. WALTERS: I don't recall that, Judge. You might have –

THE COURT: Well, it doesn't matter.

If I didn't say – they can go back as far as they want. It's a medical question. You are to do what you are told.

Now, it should have occurred to you at the pretrial conference that I knew about the patient-physician privilege and that I understood that, frequently, medical records are exempt from discovery.

But when you bring a case making claims based on your medical condition, your records are not privileged and you either produce them or I dismiss the case. That was all covered when I said for you to produce the records. The discussion was over.

When I say "produce your records," that is not an invitation to wait two months and file a bunch of motions about those records. The time for you to have asserted a privilege that you may have had was when I told you to produce them.

MS. DAVIS: Your Honor, I did that.

THE COURT: And I overruled it, apparently, didn't I?

MS. DAVIS: Your Honor, you didn't speak to that. My motion was not written. And at the particular –

THE COURT: Well, it doesn't need to be written, [p. 6] Counsel. You speak up or it is over.

MS. DAVIS: Your Honor, you prohibited me from speaking any further during the hearing. Furthermore, I did not –

THE COURT: Well, it's because you refused to talk about what I want to talk about. We have to focus.

Now, you don't have a privilege. You are making claims based on what this drug did to you. You must give them the evidence about your medical condition.

MS. DAVIS: Your Honor, if I may be allowed to respond? When I made the initial disclosures at – before pretrial, all of those documents have been furnished. On the date –

THE COURT: All of what documents?

MS. DAVIS: All of the medical records that I had submitted to them as related to this particular claim have been submitted, and they have all of those records.

On the day after our pretrial conference, I asked them what records do you not have so that I can get those for you by the 17th.

THE COURT: You knew what they had. You gave them to them. You knew what they had because you gave them the records they had.

MS. DAVIS: Your Honor, I didn't have –

THE COURT: So, all you do is give them the rest.

[p. 7] MS. DAVIS: I did not give them the records all the way dating back from my birth because they weren't relevant.

THE COURT: No, no. Wait, wait.

MS. DAVIS: They asked for all of that after our hearing.

THE COURT: Ms. Davis, no. At the hearing.

MS. DAVIS: After the hearing.

MR. WALTERS: That's not correct, Judge.

THE COURT: Wait.

Ms. Davis, any records Syntex had about your medical history, you gave them in your initial disclosures.

MS. DAVIS: Yes, Your Honor.

THE COURT: That's the only records they had.

MS. DAVIS: Uh-huh.

THE COURT: So when I say, "Give all your medical records," you knew what they had because you had furnished them, so you knew what was left to be furnished, without ever talking to Mr. Walters.

MS. DAVIS: That's not true, Your Honor.

THE COURT: Why is it not true?

MS. DAVIS: Because, at that particular time of our pretrial conference, I had not provided them with everything. I was ordered to do so by 9-17.

THE COURT: I understand. That's what I just said.

MS. DAVIS: Uh-huh. I had no –

[p. 8] THE COURT: Look, Listen. Listen real carefully. You have ten medical records in your entire life. In the initial disclosures, you have given them three. When I say "give them everything," that means you give them the other seven. You don't need to ask him what he has. You gave him 1, 2 and 3 and decided 4 through 10 were not relevant. I said, give them to him.

There's no way that you could have not known what they had or what they wanted, because I told you when

we discussed it, he told me he wanted them all, I said give them all to him.

MS. DAVIS: Your Honor, in terms of the initial disclosures, that's not the problem. We're not talking about those medical records. We're talking about –

THE COURT: The problem is that you cannot follow orders. That is the problem.

MS. DAVIS: Your Honor, I did not understand the order of the Court to be to provide all my medical records since the time I was born, nor did I have any idea that they were going to ask for medical records from the time I was born, from the hospital of my birth on through my entire life, for incidents wholly unrelated to the cause of action pled.

So, on the day after our hearing, when I was told to produce these documents by the 17th, they had tons of documents whom I didn't even remember, didn't even know I had [p. 9] gone to. They were so far removed from this point in time that I never would have been able to respond to the order by the 17th, or I would have spoken up. And I thought we were simply talking about the medical records that was listed on my initial disclosures as being relevant and related to this cause of action.

THE COURT: Ms. Davis, that is insane. If you have made disclosures, and I say "make the rest of them," I cannot be talking about what you've already done.

June the 9th, 1997, I ordered you to produce your medical records. That is what I said, and that is what I wrote down, and that is what I signed, and that is what is on the docket sheet. It is not the least bit confusing:

"Produce medical records." I didn't say, "Give them what you've already given them"; I said "Produce your medical records."

And then, three months later, three months later, on September 8th, 1997, I then ordered you again to do it by September 17th. And as we sit here today on October 17th, you have not done it. That sounds like a deliberate, intentional violation of court order.

MS. DAVIS: Your Honor, it was not, because that was not my understanding of the Court's order.

THE COURT: Well, I am not obliged to give you understanding; I am only obliged to give you the orders. You are supposed to understand them. Apparently Mr. Walters [p. 10] didn't have any trouble understanding them.

This morning you have filed a motion to quash the depositions by written questions.

Mr. Walters, do you have one of those?

MR. WALTERS: Yes. I just got it this morning, Your Honor.

THE COURT: Then there is an amended motion for protective order and an amended motion to vacate an order that, of course, long ago expired.

Now, is it your understanding, Ms. Davis, that if I order you to do something by September 17th, and on September 12th you move to vacate that order, that the motion in any way vitiates the force of the existing order?

MS. DAVIS: I am not familiar with the term "vitiate."

THE COURT: Do you understand that moving to vacate an order stays the order or vacates the order until the hearing?

MS. DAVIS: No, Your Honor, I'm not aware of that.

THE COURT: So even though you moved before the 17th, the order has never been vacated or modified, has it?

MS. DAVIS: No, Your Honor.

THE COURT: And it has not been obeyed?

MS. DAVIS: In the Court's opinion.

THE COURT: Well, have you produced all of your

* * *

[p. 14] THE COURT: That's what it says.

MS. DAVIS: The nature of my motion is that it is usual and customary to produce an expert report 90 days before trial.

THE COURT: Ms. Davis?

MS. DAVIS: Yes, sir?

THE COURT: I'm a patient person within very restricted limits, I suppose. But don't you tell me when I tell you to do something, that it is customary to do something else.

You may do it however you want. You may choose wholly to disregard my orders. You may decide that the presumptive standards and rules of civil procedure take precedence over a case-specific direct order of the Court. That is something that you are free to do. But your case will be dismissed with prejudice.

MS. DAVIS: Your Honor, may I –

THE COURT: Is that clear?

MS. DAVIS: Yes. I hear you, Your Honor.

THE COURT: So do not tell me that you prefer to do something that is customary, rather than as I order it. We will discuss each subject, and then I will decide how it will be handled, and then you will either do it or the case will be dismissed. It's very simple.

Now, we have discussed this. Actually, I think [p. 15] the initial conference was June 9. We have discussed on a couple of occasions that Syntex has a responsibility to respond to a very specific, scientifically based complaint; they do not have the responsibility to disgorge all of their files just because you have made an unsubstantiated complaint against them.

If you can articulate some specific need for some documents that they may have, then I will make them produce them, if I believe the need is genuine. Certainly if one of your science consultants articulates the need for some additional data besides your condition and the history of what you took when, then I will consider making them respond to it promptly.

But for you to demand wholesale, so far, apparently wholly irrelevant documents from them, while cloaking

your medical history, suggests a malicious attempt to have Syntex pay you the value of the transaction cost you're imposing by making the claims in the first place. And that is not why we have lawsuits, so that you can extort a settlement value from them by attrition.

If Syntex had done something wrong, it should compensate you. It is your responsibility as the plaintiff to prove that they did something wrong.

At the moment, we have no evidence that the injury you claim to have suffered is connected with Syntex's [p. 16] product, and that is an essential element of your claim and we are not doing anything else until we know that Syntex has a factual connection to this case.

MS. DAVIS: Your Honor, if I might respond, this is not an attempt to extort money from the defendant. There has been material submitted to this Court along with my pleading that shows the causal connection between this drug, without the benefit of an expert.

It shows that this condition does occur; that it has occurred with children that are taking this medication, it has occurred in the studies. That information has been submitted to the Court, with or without my expert report.

Now, if I am prohibited totally from examining the records, there is certainly enough information that I have obtained from the FDA that indicates that this is a causal effect of this drug.

If I am prohibited from doing any discovery whatsoever, you limit my ability to prepare for my case. The Court is – the jury is supposed to be the trier of fact, not the Court, and I am being prohibited from ever getting

my case to the jury or doing anything because I can't look at any documents related to this.

The defendants had to submit information to the FDA. They've done studies. They've done all kind of lab reports. Almost everyone that I have contacted in connection

* * *

[p. 18] is setting a different standard than it is setting for any other plaintiff in the United States, and it is inappropriate, Your Honor.

THE COURT: Anything else?

MS. DAVIS: I am asking the Court to reconsider its position and allow me the time to produce the expert report after having engaged in substantial discovery and having the defendants disclose the relevant information that I have asked for.

I have not asked for any documents that are irrelevant. I have case law that will support that everything I have asked for is relevant, reasonable, necessary and material to this cause of action.

And aside from all of that, the defendants have obtained almost all of my medical records, and an execution for authorization has been tendered to them for everything they haven't obtained, even though I don't believe that they're entitled to everything.

THE COURT: I didn't tell you to give them permission; I told you to give them the medical records.

MS. DAVIS: Your Honor, I could not, in the scope – in the course of nine days, go to every medical

provider that I've ever been to in my life. I don't even know who they are.

That is an impossible burden to meet, and I cannot do it. If I hired a team of people, they couldn't do

* * *

[p. 20] "Give us medical records going back to the time of your birth." That's just not accurate.

MS. DAVIS: Community Hospital is where I was born. It's doesn't even exist anymore.

THE COURT: I don't care where you were born, Counsel. And do not talk to the other lawyer. You want to have a conversation with Mr. Walters, call him up, take him to lunch or something.

Did they send you a release?

MS. DAVIS: Yes, Your Honor, they did.

THE COURT: Did you sign it and send it back within a week?

MS. DAVIS: No, Your Honor, I did not.

THE COURT: Have you ever sent it back?

MS. DAVIS: Yes, Your Honor, I have.

THE COURT: When did you send it back?

MS. DAVIS: I sent it back after our status conference.

THE COURT: When?

MS. DAVIS: I don't know the date.

THE COURT: Well, we've had several. So you sent it in September?

MS. DAVIS: Yes, Your Honor, I did.

THE COURT: And they sent it to you when? In June?

MS. DAVIS: Your Honor, as I explained –

[p. 21] THE COURT: In June? Is that when they sent it?

MS. DAVIS: I believe so.

THE COURT: And you returned it in September, after you had been twice ordered to produce the records yourself?

MS. DAVIS: No, Your Honor. When I came here on September the 17th, I sent a stack of items to Baker & Botts about this thick (indicating). I did not realize that it was not in there until I got a subsequent letter from them, saying "We don't have it." I sent them –

THE COURT: You didn't send it to them. Whether it was a mistake or just being obnoxious, you either sent it or you didn't. You see, there are real-world things out there. Either they have it or they don't. And if there is some explanation, that's fine.

But the answer to the question is, you got it from them in June and you did not return it until after two court orders to do it yourself. And then, two months or so, three months and two court orders later, you sent it to them. Those are the facts.

Have you not been admitted to the Angleton Danbury General Hospital in the last ten years?

MS. DAVIS: I don't know when was the last time I was there.

THE COURT: So, it is –

MS. DAVIS: I would think that it was – it has been

* * *

[p. 25] specificity in the pleadings. And the only things made with specificity are these allegations of the medical condition. The only people I know that have any knowledge of those things are plaintiff and her doctors.

I don't know what else I'm supposed to do in response to a complaint that says, "I took your product, I have a bunch of problems, and you're at fault."

What I have received since then, I have requests for productions that literally ask for every single piece of paper that we have that has the word "Synarel" written somewhere on it.

I don't know what else to do until we get to the point where we have done what the Court has ordered and we have the medical records and we have the expert reports and we have somebody who is going to come forward and say, "Look, this is what the problem is. It's this, this and this," and we can say, "Okay, here is somebody who is knowledgeable about that and you can take their deposition."

THE COURT: The reason for case-specific discovery orders is that cases vary a great deal in the factual

context, and there is, as this case illustrates, considerable asymmetry in sources of information.

In a case like this, the plaintiff has unique knowledge that connects her injury to the defendant. This is not a case where the defendant knows how it was driving or how [p. 26] it maintained its truck right before the collision.

The defendant in this case is obliged to make considerable regulatory disclosures, does in fact commercially disclose medical data about the drug, and most of all, has the requirement in this state that there be a licensed medical expert between the sale of the drug and the consumption by the patient.

Under the circumstances of this type case, the discovery is – the information that needs to be discovered is the plaintiff's information.

I have had these kinds of cases where it turned out, when you looked at the medical records, the plaintiff actually didn't take the drug as alleged.

The only way to find out whether there is a connection between the plaintiff's claim of this drug's ill effects is to know the nature of the plaintiff's physical condition, the diagnosis, what was prescribed and when; including the defendant's drug, plus other drugs, because there are positive and negative synergies, although I don't think "synergy" technically should be used in a negative sense.

There are good and bad combinations for drugs, and there are good and bad combinations of symptoms. And

most important, every biochemical adjustment of a person has secondary consequences that are less than favorable. No [p. 27] medical or chemical intervention does not have side effects. Therefore it is essential in this kind of case, that the defendants know the benefit sought, the benefit achieved, as well as the alleged secondary unfavorable consequences.

The Court has not totally prohibited discovery from the defendant. The Court has made the discovery from the defendant depend upon a proper production by the plaintiff of a connection between her complaint and the defendant's product.

Ms. Davis, when do you think the Daubert report is now due under the several extensions that Syntex and the Court have allowed you?

MS. DAVIS: October 31, 1997.

Your Honor, may I sit, please? If I stand for a long period of time, I experience dizziness.

THE COURT: You may sit.

MS. DAVIS: Thank you.

THE COURT: Ms. Davis, I am not sure that you are in exactly a position to answer this, but I want to ask it: Your physical condition does not have the effect of interfering with your ability, that is, your competence, to perform these tasks that are required in litigation, does it?

MS. DAVIS: To a certain extent, yes. There are episodes when I cannot visualize things properly. I can't – there are times when I'm prohibited from driving, or I

[p. 28] can't drive because I am having blurriness of vision and severe headaches, so I'm not –

THE COURT: But you wouldn't have had severe headaches and blurry vision for four months.

MS. DAVIS: No. I am not saying it is an every-day occurrence. It comes and goes.

THE COURT: And we have no motion for a continuance based on your condition?

MS. DAVIS: No, Your Honor. I was hoping to have counsel retained by this point in time.

THE COURT: Unfortunately, if you conclude that your competence to respond to the requirements of litigation has been diminished, the only solution is that you find other counsel.

MS. DAVIS: Yes, Your Honor. I am intending to do that.

THE COURT: There is nothing I can do, other than make sure that that question is addressed.

The request for motion to – the request for production from Syntex is quashed. The deposition on written questions are not quashed. No protective orders will be granted, and the December – or the October 31st deadline for the expert reports subsists.

MR. WALTERS: Your Honor, may I sit, as well?

THE COURT: You look young and healthy.

MR. WALTERS: All right.

THE COURT: You can sit until I talk to you.

MR. WALTERS: Certainly. I understand that.

THE COURT: Yeah.

After the – and at this point, I want a copy of the medical reports filed with the Court, as well as Mr. Walters.

MS. DAVIS: Your Honor, may I ask a question?

THE COURT: Yes, ma'am.

MS. DAVIS: Since they have a medical organization and have already requested these documents through Marcus Business Records, are you still requiring that I actually physically go get the remaining records?

THE COURT: Well, that's what I was thinking about during that long pause. You will get to Mr. Walters by noon Tuesday a complete list, as I described, of your best recollection of every medical service provider whom you have ever seen, and you will sign it.

Syntex's request for the deposition upon written questions will go ahead to those people to whom they have already been issued, and when Mr. Walters gets his bill for them, he is going to send it to you and you will pay it.

You have the list of people that – whom they have notified of their depositions, and you need to make sure that all the rest of your medical care providers is disclosed. It [p. 30] would be helpful if you could remember roughly when and roughly for what you may have seen those people, but that's not a limitation.

Now, do we still have an early November conference set?

MR. WALTERS: Your Honor, I walked out without my calendar. I apologize.

MS. DAVIS: It's set for November 10th, Your Honor.

THE COURT: November 10th, 3:30.

Ms. Davis, if you have not done as you have been ordered, including any subsidiary orders that may have been made and not discussed today, or if you otherwise have been intransigent, I am going to dismiss your case with prejudice. Is that clear?

MS. DAVIS: Yes, Your Honor.

THE COURT: Is there anything else you would like to discuss today?

Ms. Davis?

MS. DAVIS: Yes, Your Honor. I am going to request that the Court recuse itself in this case because I don't believe that I would get a fair trial in this particular matter, nor do I believe that I will be treated fairly in this particular case. I believe that there is a great deal of bias in this matter, and I am requesting that the Court recuse itself.

[p. 31] THE COURT: Would you describe, just for the record, as lawyers say, the particular interest the Court may have in this case, or any personal connection to the subject?

MS. DAVIS: No. I don't know of any personal connection that Your Honor has to the subject matter or to the parties in this case.

THE COURT: The Court accepts the oral motion to recuse, and it is denied. Anything else?

MS. DAVIS: No, Your Honor.

THE COURT: Mr. Walters, anything else?

MR. WALTERS: No, Your Honor.

THE COURT: All right. Counsel may be excused.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS,	§	
	§	
Plaintiff	§	
	§	
VS.	§	_ H-97-177
	§	
SYNTEX LABORATORIES, INC.	§	
& ROCHE BIOSCIENCES,	§	
	§	
Defendants	§	

RESPONSE TO THE COURT'S ORDER TO PROVIDE THE NAME OF MEDICAL PROVIDERS

(Filed Oct. 23, 1997)

TO THE HONORABLE COURT:

1. The Defendant has evidenced knowledge of the foregoing medical providers, either through information supplied by Plaintiff or some other source:

   Taghi Shafie – Neurologist –
   D/b/a National Neuro-Psych Thermo
   4150 Westheimer, Suite 105, Houston, Texas 77027
   Diagnosed condition of brain hemorrhage; hospitalization; follow-ups and continuing care since hemorrhage

   a. Edward C. Murphy – Neurosurgeon
   b. David Turner – General Practitioner;
   c. Dr. Gary Tunell – Neurologist
   d. Dr. Wanda Mott – Gynecologist
   e. Dr. Saeid Abedin – Ophthalmologist

f. Dr. Ken Smith
g. Columbia Bellaire Medical Center
h. Henry D. Wilde, Jr.
i. Raymond Martin, M.D.
j. Memorial Hospital Southwest
k. Brazosport Memorial Hospital
l. Angleton-Danbury General Hospital
m. Texas A & M University – A.P. Beutel Health Harris County Child Protective Services
o. Liberty Mutual Insurance Group
p. North Texas Rehabilitation Center
q. John Burr Miller III
r. Richard Berger
s. Samuel Marynick – never seen
t. Maurcie L'Ecuye – never seen
u. David B. Rosenfeld – do not know who he is
v. Community Hospital
w. Dr. S.K. Reddy
x. Dr. Benjamin Weiner

2. In addition to the foregoing, Plaintiff has only seen the following physicians to the best of her recollection:

a. Dr. Kristina Greenwoood [sic] – 4225 Office Parkway, Dallas, Texas 75204 – psychological care from 1994-1995

b. Dr. Robert Kilian 131 Circle Way, Lake Jackson, Texas 77566 – treatment of DeQuervain's disease 1996

c. Dr. Delcambre 7777 Forest Lane, Bldg. A, Dallas, Texas – reasons unknown – 1992

d. Dr. Patrick McNamara 4101 Greenbriar, Suite 200, Houston, Texas 77098 – reasons unknown – 1993

3. Be advised that Plaintiff will not pay for the production of the records from the foregoing, as it is appears patently obvious from the Court's statements regarding dismissal on October 31, 1997, due to lack of Plaintiff's expert report. Therefore, Plaintiff wholly objects to the obtaining of documents that are not relevant. Moreover, the production of documents have [sic] been obtained without proper authorization from Plaintiff.

4. Plaintiff further reserves all objections for an appeal of this cause due to said dismissal.

Respectfully submitted,

/s/ Veronica L. Davis
Veronica L. Davis

DEFENDANT'S EXHIBIT A

Veronica L. Davis

Attorney at Law
222 N. Mattson
West Columbia, Texas 77486
(409) 345-2953
(409) 345-5461 Telecopier

Marker's Business Records
13105 Northwest Freeway (Filed Nov. 4, 1997)
Suite 300
Houston, Texas 77040-6312

October 29, 1997

Re: Cause No. H-97-177; Veronica L. Davis vs. Syntex Laboratories, Inc. and Roche Bisociences; In the United States District Court for the Southern District of Texas

Dear Sir or Madam,

Please let this letter serve as your third notice that you are releasing my records without proper authorization. I advised your office by telephone and by facsimile transmission that no records of mine should be released at the request of Richard Jospehson [sic] or any other person from Baker & Botts.

First and foremost, you released my medical records without a medical authorization. I did not execute a medical authorization for the release of any records until September 16, 1997. Said authorization specifically prohibited the release of records prior to May, 1993. Moreover, said release failed to provide for the release of any personnel records or employment records.

Your office was previously noticed on September 15, 1997 of a pending Motion for Protective Order/Motion to Quash. Be advised further that this cause will be dismissed, according to the order of the Honorable Lynn Hughes on October 31, 1997. However, I intend to appeal all decisions and rulings heretofore made by the said Lynn Hughes.

Given the fact that you have disseminated medical records without an authorization and that this cause is set for dismissal, be advised that if any records pertaining to me are released to Baker & Botts, I will take **immediate legal action** against Marker's Business Records. Moreover, if further records are obtained by Marker's, in violation of my privacy rights, I will take legal action.

Consequently, any and all pending records requests should be denied, including but not limited to Lewis Gottlieb, Apolinar Dizon, John Delcambre, A.P. Beutel Center at Texas A & M University, Bureau of Reclamation, U.S. Department of Education, Dr. Sheryl Manning, Baylor University Medical Center Radiology Department, or any and all other entities that you have previously requested records from.

Thank you in advance for your immediate attention to this matter.

Sincerely,

/s/ Veronica L. Davis
Veronica L. Davis

CERTIFIED MAIL, RETURN RECEIPT REQUESTED No. P 210 373 336 and VIA FACSIMILE TRANSMISSION

(Logo) MARKER'S BUSINESS RECORDS, INC.
a MARKER-HOFF GROUP *Company*

November 24, 1997

Mr. Richard Josephson
BAKER & BOTTS (Filed Nov. 25, 1997)
910 Louisiana, Suite 3000
Houston, Texas 77002-4995

RE: Cause No. H-97-177; Veronica L. Davis vs. Syntex Roche Biosciences, Inc.

Dear Mr. Josephson,

Please be advised that Ms. Davis has not received the Notices of Intention to Take Deposition upon Written Questions issued for the following:

Texas Department of Human Services:	**Personnel records**
Eddie Matsu, M. D.:	**Medical records**

We sent Ms. Davis the above mentioned notices, via registered mail, on October 28, 1997. On November 17, 1997, the notices were returned to us because Ms. Davis did not claim them. I have attached a copy of the envelope returned to us for your records. As you can see, Ms. Davis received three notices informing her of such mail, which was sent to the same address that we had previously, successfully used for other notices.

Please advise me if I can assist you further with this manner.

Sincerely,

MARKER'S BUSINESS RECORDS, INC.

/s/ Sonya J. McCrory
Sonya J. McCrory

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS,	§	
	§	
Plaintiff	§	H-97-177
VS.	§	
SYNTEX LABORATORIES, INC.	§	(Filed Nov. 7, 1997)
& ROCHE BIOSCIENCES,	§	
	§	
Defendants	§	

NOTICE OF NON-ATTENDANCE FOR PRE-TRIAL CONFERENCE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, VERONICA L. DAVIS, and makes files this Notice of Nonattendance and in support thereof would show the following:

1. Plaintiff has filed a Motion to Disqualify the Honorable Lynn Hughes in the above and foregoing procedure pursuant to 28 U.S.C. § 455(a),(b)(1).

2. Plaintiff would show that the Court must rule on Plaintiff's Motion for Recusal prior to issuing any further orders in this cause.

3. Plaintiff would show that if the Court does not recuse itself, the Court has already determined that it would dismiss Plaintiff's cause of action, even though the Plaintiff has sought reconsideration of that ruling.

4. Therefore, Plaintiff finds that a pre-trial conference would serve no legitimate end.

5. Plaintiff would show that she has been subjected to such bias by the Court and wholly prohibited from offering information during pre-trial matters.

6. Plaintiff would show that after her last encounter with the Court on October 17, 1997, it was necessary to seek medical attention. Plaintiff does not wish to subject herself to same and finds that it is not in her best interests to appear.

7. Plaintiff would show that if the Court so requires that she will be available by telephone during the designated time set for the hearing.

WHEREFORE PREMISES CONSIDERED, Plaintiff again requests that the Honorable Lynn Hughes recuse himself from the instant case and disqualify himself as the Judge in all matters related to the instant cause, and make no further orders or hold pre-trial conferences until the Motion to Disqualify has been ruled on

Respectfully submitted,

/s/ Veronica L. Davis
Veronica L. Davis
Plaintiff Pro Se
222 N. Mattson
West Columbia, Texas 77486
(409) 345-2953

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Notice of Non-Attendance shall be sent to Baker & Botts by facsimile transmission on or before November 10, 1997.

/s/ Veronica L. Davis
VERONICA L. DAVIS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS, Plaintiff, VS. SYNTEX LABORATORIES, INC., and ROCHE BIOMEDICAL LABORATORIES, INC., Defendants.	Civil Action No. H-97-CV-177 Houston, Texas November 10, 1997 4:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LYNN N. HUGHES
PRETRIAL CONFERENCE

APPEARANCES:

FOR THE DEFENDANTS:

Mr. Mark Walters
BAKER & BOTTS
910 Louisiana
Suite 3000
Houston, Texas 77002-9934
(713) 229-1234

COURT REPORTER:

GAYLE L. DYE, CSR, RMR
515 Rusk Room 8116
Houston, Texas 77002
(713) 250-5582

PROCEEDINGS RECORDED BY STENOGRAPHIC MEANS, TRANSCRIPT PRODUCED FROM COMPUTER-AIDED TRANSCRIPTION

[P. 2] PROCEEDINGS

November 10, 1997

THE COURT: Veronica Davis versus Syntex Laboratories.

MR. WALTERS: Mark Walters for Syntex, Your Honor.

THE COURT: Mr. Walters, have you see Ms. Davis?

MR. WALTERS: I have not, Your Honor. On the way here, I stopped by my office to pick up my mail; and I had a fax that was a – it says it's a notice of non-attendance for pretrial conference.

THE COURT: May I – I don't think I got that. May I see that, please?

MR. WALTERS: Yes, Your Honor.

THE COURT: According to the transmittal data, it was sent from 409-345-5461 at 12:18 p.m., November 10, 1997, from a machine that imprints the name Veronica L. Davis.

One would assume that her machine is on semi-daylight savings time since you – your machine received it at 11:39.

MR. WALTERS: I have no explanation for that, Your Honor.

THE COURT: Like I say, I don't know whether this was sent; but I would like to make a copy of it and file it. Before getting that facsimile transmission about noon today, Mr. Walters, you had no further contact with Ms. Davis?

[p. 3] MR. WALTERS: No, Your Honor. The only point I'd bring to the Court's attention is at the last hearing on October 17, among other things, the Court denied Ms. Davis's motion to quash our outstanding subpoenas for her medical records and ruled that those would go forward and she was to pay the costs of executing those subpoenas.

Subsequent to that, she sent a letter to our records service threatening legal action against them if those subpoenas were executed.

THE COURT: Do you have a copy of that?

MR. WALTERS: I do. And we filed a motion to dismiss, I think, last week; and it's attached as an exhibit to that motion, as Exhibit –

THE COURT: Okay. If it's in the record, that's fine.

MR. WALTERS: It is. But I have an extra copy here as well. And so, we asked in our motion for dismissal – this is – we've had several months of passive non-compliance with the Court's orders. This is a step to actively frustrate our ability to implement what the Court has told us to do.

THE COURT: Since that's in the file, I'll return that to you. I'm hesitant to put you to the trouble of coming back for another hearing, but I think prudence

suggests that we take up not only the matters that should [p. 4] have been taken up today but all the additional matters, including her failure to appear today, on December 4th when that hearing – additional hearing was set.

But I guess so that there's no confusion on her part about the extent of my authority, I will enter a written order denying the recusal since she seems to be laboring under a misapprehension about the effect of her motions on her responsibilities and my obligations.

MR. WALTERS: So, we don't need to respond to that motion to recuse?

THE COURT: No, sir.

MR. WALTERS: Thank you.

THE COURT: If Courts were recusable for errors of law, we would all be recused.

All right. You may be excused. Thank you, Mr. Walters.

MR. WALTERS: Thank you, Your Honor.

(Proceedings concluded at 4:04 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

1-27-98 /s/ Gayle L. Dye
Date Gayle L. Dye, CSR, RPR, RDR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS, Plaintiff; vs. SYNTEX LABORATORIES, INC., Et al, Defendants.	)	CIVIL NO. 97-177 Houston, Texas 12/04/1997 3:30 P.M.

HEARING

BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

FOR THE DEFENDANT: MARK WALTERS

Court Reporter: Anne Traylor, CSR, RPR
Official Court Reporter
515 Rusk, Room 8016
Houston, Texas 77002

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

[p. 2] THURSDAY, DECEMBER 4, 1997 3:30 P.M.

THE COURT: A nice gentlemen is on the way to deliver to you, Mr. Walters, a copy of this, inch and a quarter application for a writ of mandamus by Ms. Davis.

As that was being delivered, I had my secretary telephone Ms. Davis and asked her whether she intended to appear; and she said, having been reached in West Columbia, that she did not intend to appear and she didn't believe she should have to appear as long as the application for a writ of mandamus was pending before the Court of appeals.

I am sorry that that puts Syntex to the additional cost of responding, but there is obviously nothing I can do to persuade Ms. Davis to follow the rules or my orders or otherwise responsibly to pursue this claim.

Today we got her motion for a reconsideration, and I believe that Syntex also has a motion to dismiss.

MR. WALTERS: That's correct, Your Honor.

THE COURT: I find this very frustrating. Do you have any suggestion other than having countenance to her disobedience for about three or four months? I told her in October 17th that I would dismiss it if she didn't get with the program. After that she began threatening your subpoena service with legal action.

[p. 3] MR. WALTERS: That's correct.

THE COURT: Do you have any suggestions?

MR. WALTERS: Nothing other than dismissing the case, Your Honor.

THE COURT: I already said I'm going to do that, and of course –

MR. WALTERS: I think we asked in our motion, given, besides not complying with the Court's order, given these other acts, threatening the records service –

THE COURT: Willful nonappearance in two different hearings.

MR. WALTERS: Yes.

THE COURT: This one, so that the record is clear, as lawyers always say, this one was reset at her request, remember?

MR. WALTERS: I think that's correct, Your Honor. I know she got a notice of it because she sent me a copy of the –

THE COURT: Now, did she – at some point she called saying that she's not well and needed to reset. I don't know that – I don't know which hearing it was, but talking to my staff, she did not – oh, November 7th she filed, the date, a notice of nonattendance with pretrial conference.

MR. WALTERS: Correct.

[p. 4] THE COURT: And indeed she did not appear. Maybe this one was a recent –

MR. WALTERS: We had asked in our motion given these other acts, that the dismissal be with prejudice and also ask for costs of attorney fees.

Beyond that I don't know what other kind of, anything else that the Court as I think is – I don't know what other suggestions we could make to –

THE COURT: Well, you know, before you impose the death penalty, as people say, you should work hard to assure yourself that no lesser penalty would suffice.

In this case on a couple of occasions, the complications of this kind of claim had been discussed with Ms. Davis, and what was required to connect Syntex's substance to her condition was discussed.

At those occasions, the entries in her medical records which appeared to disclaim the very connection that she was asserting were discussed, all in an effort to focus both counsel on what truly needs to be done in the case rather than traditional standard discovery.

She has repeatedly refused to produce the information peculiarly within her knowledge, has categorically refused to obey orders to furnish records and identify people, and has not, of course, produced an expert's report or identified any expert who makes the connection of [p. 5] her identification of her medical service providers, as we discussed with her once before, is wholly inadequate.

She is sometimes sick but she's not too sick to produce notices of nonappearance, repetitive motions to recuse, all based on my inability to read the rules of civil procedure, including this inch and a quarter stack of stuff and her refusal to attend hearings.

Frequently, in these kinds of cases, the Court is put in the dilemma of ascertaining whether we're dealing with client recalcitrants or counsel's recalcitrants. Here that dilemma is solved because patient and doctor are the same, and it is clear to me that Ms. Davis has a peculiar view of her responsibilities as a client, and independently as counsel. She has failed in both of those duties after, what I believed to have been, polite, patient reexplanations of her responsibilities.

The only response that Syntex or the Court has received from the attempt to manage this litigation so we could dispute and resolve the problems that actually occurred has been unilateral assertions that she's not going to comply, not going to attend, not going to pay for, not going to produce, and perhaps the most egregious, is to threaten suit against what amounts to a clerical service retained by your firm.

Noncooperation comes naturally to some folks [p. 6] with not much effort. In those instances she actively asserted, as a lawyer and client, a cause of action against people who didn't, people who are not responsible for the actions that they were about to take, and who in any event had not done anything wrong if they had done everything they had been asked to do.

That's one step, one small step about willful destruction of evidence. It increases the costs, of course, and reduces the likelihood that Syntex will see the evidence that will make it clear one way or the other that it might be responsible for her illness.

I am going to dismiss the case with prejudice. I am not going to assess costs and fees, not because I have not concluded you're not entitled to them, or Syntex is not entitled to them, but because I believe that it would simply exacerbate the transaction costs, and you would be spending more of Syntex's money and more judicial time trying to enforce or collect that adjustment of the cost than it would ever be worth to you.

So I concluded that you're entitled to costs. I will, of course, assess the Court costs against her, but I'm not going to order attorneys fees and all the other – because

you'll never see it. And I'll allow you to argue wide and long about that.

Do you see any utility to that at all?

[p. 7] MR. WALTERS: Well I think that you can – you may well be right about the ability to collect them. I think given these circumstances where we've pled for them, it might – if Your Honor concludes that we are in fact entitled to them, I think we'd like to have the order; and then at some point down the road, when it's appropriate, we can, we can look into that a little more.

And Your Honor may well be right. It may not be worthwhile, and you may just make that decision.

THE COURT: Do I have what the bills were, say, for the copy service?

MR. WALTERS: We haven't filed the bill of cost yet or an affidavit of attorneys fees.

THE COURT: All right, well, do that, promptly, and I will liquidate them. Maybe that gives you something to give up, but just make it a cost adjustment and not, you know, punitive.

MR. WALTERS: Right, I understand.

THE COURT: Even though this is the kind of case where punishment has been earned. So if you will get me that, please, sir.

MR. WALTERS: I will do it, Your Honor.

Anything else, Mr. Walters?

MR. WALTERS: I don't believe so, Your Honor.

THE COURT: Thank you.

[p. 8] (Proceedings concluded.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings i the above-entitled matter.

1/22/1998

/s/ Anne Traylor
Anne Traylor, CSR, RPR.